Nos. 16-961, 16-1017, and 16-1423

In the Supreme Court of the United States

NICOLE A. DALMAZZI, PETITIONER

v.

UNITED STATES OF AMERICA

LAITH G. COX, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

KEANU D. W. ORTIZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether 10 U.S.C. 973(b), which provides that, except as "otherwise authorized by law," a military officer may not hold a "civil office" that requires a presidential appointment with Senate confirmation, prohibits a military officer from serving as a presidentially-appointed judge on the United States Court of Military Commission Review (CMCR).

2. Whether the Appointments Clause of the Constitution, Art. II, § 2, Cl. 2, bars an individual from serving simultaneously as a presidentially-appointed judge on the CMCR and as an appellate military judge on a service court of criminal appeals.

3. Whether this Court has jurisdiction to review the cases in Nos. 16-961 and 16-1017 under 28 U.S.C. 1259(3).

4. Whether, if this Court does have jurisdiction in Nos. 16-961 and 16-1017, the Court of Appeals for the Armed Forces abused its discretion in denying review in those cases.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 2
Constitutional and statutory provisions involved 2
Statement 2
A. The court-martial system 3
B. The military-commission system and the Court of Military Commission Review 6
C. The *al-Nashiri* litigation 8
D. The present controversy 11
1. *Dalmazzi* and *Cox* 11
2. *Ortiz* 12
Summary of argument 13
Argument:
I. Petitioners are not entitled to relief under 10 U.S.C. 973(b) 16
A. Section 973(b) does not prohibit military officers from serving on the CMCR 17
1. A CMCR judgeship is not a "civil office" within the meaning of Section 973(b) 18
2. Military officers are "authorized by law" to serve as CMCR judges 27
B. Even if Section 973(b) prohibited military officers from serving on the CMCR, Congress expressly foreclosed the relief petitioners seek 31
II. Simultaneous service on a CCA and the CMCR does not raise constitutional questions 37
III. This Court lacks jurisdiction in *Dalmazzi* and *Cox*, but has jurisdiction in *Ortiz* 41
A. This Court lacks jurisdiction in *Dalmazzi* and *Cox* because Section 1259(3) does not authorize review of the CAAF's denial of discretionary review 41

Table of Contents—Continued: Page

B. This Court has jurisdiction in *Ortiz* because 28 U.S.C. 1259 is a valid grant of appellate jurisdiction 45
IV. Even if this Court has jurisdiction in *Dalmazzi* and *Cox*, it should not disturb the CAAF's discretionary denials of review 51
Conclusion 54
Appendix A — Constitutional and statutory provisions 1a
Appendix B — Department of Defense Directive No. 1344.10 (Feb. 19, 2008) 19a

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Cases:

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791 F.3d 71 (D.C. Cir. 2015) ..... *passim*
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Ashwander v. *TVA*, 297 U.S. 288 (1936) 31
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Highmark Inc. v. *Allcare Health Mgmt. Sys., Inc.*, 134 S. Ct. 1744 (2014) 52
Isbrandtsen Co. v. *Johnson*, 343 U.S. 779 (1952) 35
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Ryder v. *United States*, 515 U.S. 177 (1995) 45
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Siebold, Ex parte, 100 U.S. 371 (1880) 39
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Solorio v. *United States*, 483 U.S. 435 (1987) 45, 47, 48

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U.S. Const.:
Art. I 48
§ 6, Cl. 2 39
§ 8:
Cl. 14 ..... 3, 16, 47, 49, 1a
Cl. 17 49
Art. II, § 2, Cl. 2 (Appointments Clause) ..... *passim*, 1a
Art. III ..... *passim*
§ 2, Cl. 1 (Commander-in-Chief Clause) 15, 36, 41, 2a
§ 2, Cl. 2 ..... 8, 46, 2a
Art. IV, § 3, Cl. 2 48
Amend. V (Grand Jury Clause) 47
Act of Jan. 2, 1968, Pub. L. No. 90-235, § 4(a)(5), 81 Stat. 759 19

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Tit. X, Pt. A:
§ 1002, 97 Stat. 655-656 ..... 19, 15a
§ 1002(a), 97 Stat. 655 ..... 32, 15a
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Judiciary Act of 1789, ch. 20, § 4, 1 Stat. 74-75 40
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10 U.S.C. 948a(7)(C) 7
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10 U.S.C. 948b(a)-(b) 21
10 U.S.C. 948b(c) 7, 21
10 U.S.C. 948c 21, 25
10 U.S.C. 948i(a) 21
10 U.S.C. 948j(a)-(b) 21
10 U.S.C. 948m(a) (Supp. IV 2016) 21
10 U.S.C. 949b(b) 10, 30, 41, 8a
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10 U.S.C. 949m(c) (Supp. IV 2016) 21
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10 U.S.C. 950f(b)(1) 14, 28, 10a
10 U.S.C. 950f(b)(1)-(3) 28, 10a, 11a
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10 U.S.C. 950f(d) 7, 11a
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10 U.S.C. 950g 7
10 U.S.C. 950p(c) 21
10 U.S.C. 950p(d) 25
Uniform Code of Military Justice, 10 U.S.C. 801 *et seq.* 3
10 U.S.C. 802(a) 48
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10 U.S.C. 816 3
10 U.S.C. 816(1) 3, 21
10 U.S.C. 818(a) (Supp. IV 2016) 3
10 U.S.C. 819-820 3
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10 U.S.C. 826(a)-(b) 21
10 U.S.C. 860 (2012 & Supp. IV 2016) 3
10 U.S.C. 866 ..... 4, 39, 2a
10 U.S.C. 866(a) 4, 25, 28, 32, 2a
10 U.S.C. 866(b)(1) 4, 3a
10 U.S.C. 866(c) 4, 7, 3a
10 U.S.C. 866(c)-(d) 21
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10 U.S.C. 867(a)(3) 4, 52, 6a
10 U.S.C. 867(c) 5, 6a
10 U.S.C. 867a(a) 6, 16, 42, 7a
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10 U.S.C. 942(c) 48, 51

Statutes—Continued: Page

5 U.S.C. 5312 19
5 U.S.C. 5313 (Supp. IV 2016) 19
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10 U.S.C. 113(a) 25
10 U.S.C. 973 ..... 20, 31, 32
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10 U.S.C. 973(b)(2) 10, 19, 27, 35, 37, 51, 12a
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10 U.S.C. 973(b)(3) 20, 13a
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28 U.S.C. 292(a) 39, 41
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28 U.S.C. 1258 48
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28 U.S.C. 1259(3) 2, 15, 41, 42, 43, 45, 14a
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Statutes—Continued: Page

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28 U.S.C. 1292(b) 43
28 U.S.C. 2284(b)(1) 41
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Miscellaneous—Continued: Page

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OPINIONS BELOW

In No. 16-961 (*Dalmazzi*), the opinion of the United States Court of Appeals for the Armed Forces (CAAF) (J.A. 5-10) is reported at 76 M.J. 1. In No. 16-1017 (*Cox*),

the orders of the CAAF (J.A. 26, 38, 43, 100, 105, 119) are reported at 76 M.J. 54 and 76 M.J. 64. In No. 16-1423 (*Ortiz*), the opinion of the CAAF (J.A. 132-143) is reported at 76 M.J. 189.

JURISDICTION

In *Dalmazzi*, the judgment of the CAAF was entered on December 15, 2016. The petition for a writ of certiorari was filed on February 1, 2017. In *Cox*, the judgments of the CAAF were entered on December 27, 2016, and January 17, 2017. The petition for a writ of certiorari was filed on February 21, 2017. In *Ortiz*, the judgment of the CAAF was entered on February 9, 2017, with an opinion issued on April 17, 2017. On April 26, 2017, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including June 9, 2017, and the petition was filed on May 19, 2017. The petitions were granted on September 28, 2017. In *Dalmazzi* and *Cox*, this Court lacks jurisdiction because the Court may not review "any action of the [CAAF] in refusing to grant a petition for review." 10 U.S.C. 867a(a); see pp. 41-45, *infra*. In *Ortiz*, the jurisdiction of this Court rests on 28 U.S.C. 1259(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are set forth in an appendix to this brief. App., *infra*, 1a-18a.

STATEMENT

The petitioners in these consolidated cases are military servicemembers who were convicted of various offenses by military courts-martial. Their convictions and sentences were affirmed, in whole or in part, by the Army and Air Force Courts of Criminal Appeals (CCAs). Petitioners contend that they are entitled to

new hearings before the CCAs because the panels that acted on their appeals included one or more military judges who were also appointed to the United States Court of Military Commission Review (CMCR) by the President, with the advice and consent of the Senate. Petitioners' challenges to the judges' simultaneous service on a CCA and the CMCR arise in the context of the Nation's specialized military justice system, which includes both courts-martial and military commissions.

A. The Court-Martial System

The Constitution empowers Congress to "make Rules for the Government and Regulation of the land and naval Forces." Art. I, § 8, Cl. 14. Since the Founding, Congress has exercised that authority by providing for the prosecution of offenses committed by military servicemembers in courts-martial rather than in civilian Article III courts. Today, the court-martial system includes three levels of specialized tribunals.

1. The trial-level courts are courts-martial, which may be summary, special, or general. 10 U.S.C. 816. A general court-martial typically consists of a military judge and at least five members. 10 U.S.C. 816(1). A general court-martial has jurisdiction over all offenses under the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 801 *et seq.*, and may impose sentences up to confinement for life, or death. 10 U.S.C. 818(a) (Supp. IV 2016). Summary and special courts-martial have more limited jurisdiction and impose lesser punishments. 10 U.S.C. 819-820; see *Weiss* v. *United States*, 510 U.S. 163, 167 (1994). If a court-martial issues a conviction, its findings and sentence are reviewed by the officer who convened it, who may in some circumstances set aside a finding of guilt or reduce the sentence. 10 U.S.C. 860 (2012 & Supp. IV 2016).

2. Before 1950, "military courts of appeals did not exist." *United States* v. *Denedo*, 556 U.S. 904, 918 (2009) (Roberts, C.J., concurring in part and dissenting in part). Instead, "[i]f a service member wanted to challenge a court-martial conviction, he pursued a collateral attack in an Article III court," typically by filing a petition for a writ of habeas corpus. *Id.* at 918-919; see, *e.g.*, *Schlesinger* v. *Councilman*, 420 U.S. 738, 747 (1975).

In 1950, Congress enacted the UCMJ, which established four intermediate appellate courts: the Army, Navy-Marine Corps, Air Force, and Coast Guard CCAs. 10 U.S.C. 866. The CCAs are composed of "appellate military judges," who may be "commissioned officers or civilians." 10 U.S.C. 866(a). Unless the defendant waives review, the relevant CCA is required to review all cases in which the sentence, as approved by the convening authority, includes death, confinement for more than one year, or a punitive discharge. 10 U.S.C. 866(b)(1). The CCAs "may review *de novo* both factual and legal findings." *Weiss*, 510 U.S. at 168; see 10 U.S.C. 866(c).

3. The highest court in the court-martial system is the CAAF.[1] It consists of five civilian judges appointed to 15-year terms by the President with the advice and consent of the Senate. 10 U.S.C. 942(a)-(b) (2012 & Supp. IV 2016). The CAAF must review the record in cases in which a CCA affirms a death sentence and cases in which a Judge Advocate General seeks further review. 10 U.S.C. 867(a)(1)-(2). In all other cases, the CAAF has discretion to grant review upon a petition by the accused. 10 U.S.C. 867(a)(3). When the CAAF grants discretionary review, it need only review the "issues

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[1] Until 1994, the CCAs were called "Courts of Military Review" and the CAAF was called the "United States Court of Military Appeals." *Edmond* v. *United States*, 520 U.S. 651, 653 n.1 (1997).

specified in the grant of review." 10 U.S.C. 867(c). In all cases, its review is limited to issues of law. *Ibid.*

Only a fraction of the cases decided by the CCAs are reviewed on the merits by the CAAF. In fiscal year 2016, for example, the CCAs reviewed a total of 1244 cases. CAAF, *Annual Report* 49, 102, 122, 130 (2016), http://www.armfor.uscourts.gov/newcaaf/annual/FY16AnnualReport.pdf. The CAAF received nine mandatory filings and 719 petitions for discretionary review, of which it granted 66. *Id.* at 17.

4. Until 1983, there was no avenue for direct review of the CAAF's decisions in this Court. See Steven M. Shapiro et al., *Supreme Court Practice* § 2.14, at 129 (10th ed. 2013) (*Supreme Court Practice*). Instead, this Court considered questions related to courts-martial only in habeas proceedings and other collateral challenges brought by the accused. *Ibid.* That was "an unsatisfactory way to manage a system of judicial review," because it meant that there was no way for the United States to seek further review of adverse decisions by the CAAF—including decisions establishing important constitutional precedents or striking down military regulations. S. Rep. No. 53, 98th Cong., 1st Sess. 9 (1983) (Senate Report).

In 1983, in response to a request by the Department of Defense (DOD), Congress redressed that asymmetry by enacting 28 U.S.C. 1259, which grants this Court jurisdiction to review certain CAAF decisions by writ of certiorari. See *The Military Justice Act of 1982: Hearings Before the Subcomm. on Manpower and Personnel of the Senate Comm. on Armed Services*, 97th Cong., 2d Sess. 19-22, 38-40 (1982) (1982 Hearing) (William H. Taft, IV, Gen. Counsel, DOD). Under Section 1259, this Court has jurisdiction to review the CAAF's decisions

in cases on the CAAF's mandatory docket, cases in which the CAAF "granted a petition for [discretionary] review," and other cases in which the CAAF "granted relief." 28 U.S.C. 1259. But Congress specified that this Court "may not review by a writ of certiorari * * * any action of the [CAAF] in refusing to grant a petition for review." 10 U.S.C. 867a(a).

B. The Military-Commission System And The Court Of Military Commission Review

1. The other traditional form of military tribunal is the military commission, which has long been used to substitute for civilian courts in times of martial law or temporary military government, as well as to try members of enemy forces for violations of the laws of war. See *Hamdan* v. *Rumsfeld*, 548 U.S. 557, 595 (2006) (plurality opinion); William Winthrop, *Military Law and Precedents* 831-841 (2d ed. 1920) (Winthrop). The Nation's current system of military commissions under the Military Commissions Act of 2009 (MCA), 10 U.S.C. 948a *et seq.*, is "the product of an extended dialogue among the President, the Congress and [this] Court." *In re al-Nashiri*, 791 F.3d 71, 73 (D.C. Cir. 2015).

After Congress authorized the use of military force to respond to the terrorist attacks on September 11, 2001, the President issued an order providing for the use of military commissions to try noncitizen enemy combatants for certain offenses. *Hamdan*, 548 U.S. at 568. In *Hamdan*, this Court held that those commissions exceeded existing statutory authority. *Id.* at 567. Congress responded by enacting the Military Commissions Act of 2006, 10 U.S.C. 948a *et seq.* (2006), which it later replaced with the MCA.

The MCA "establishes procedures governing the use of military commissions to try alien unprivileged enemy

belligerents for violations of the law of war and other offenses triable by military commission." 10 U.S.C. 948b(a). An alien "unprivileged enemy belligerent" includes an alien who "was a part of al Qaeda at the time of the alleged offense." 10 U.S.C. 948a(7)(C). The procedures for military commissions are "based upon the procedures for trial by general courts-martial under [the UCMJ]," with some exceptions and modifications. 10 U.S.C. 948b(c).

2. The CMCR is "an intermediate appellate tribunal for military commissions akin to each military branch's [CCA] for courts-martial." *al-Nashiri*, 791 F.3d at 74; see 10 U.S.C. 950f. If the convening authority approves a military commission's finding of guilt, the case is referred to the CMCR for review. 10 U.S.C. 950c. The CMCR applies the same standard of review as the CCAs: It "may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as [it] finds correct in law and fact and determines, on the basis of the entire record, should be approved." 10 U.S.C. 950f(d); see 10 U.S.C. 866(c). The CMCR's decisions are appealable to the D.C. Circuit. 10 U.S.C. 950g.

3. The MCA provides that the Secretary of Defense may "assign persons who are appellate military judges to be judges on the [CMCR]." 10 U.S.C. 950f(b)(2). A person so assigned must be "a commissioned officer of the armed forces." *Ibid.* The MCA specifies that "[n]o appellate military judge on the [CMCR] may be reassigned to other duties" unless the judge voluntarily requests reassignment, retires or otherwise separates from the armed forces, is reassigned "based on military necessity," or is withdrawn from the CMCR "for good cause." 10 U.S.C. 949b(b)(4). The MCA further provides that the President may "appoint, by and with the advice and con-

sent of the Senate, additional judges," who are not required to be military officers. 10 U.S.C. 950f(b)(3); see *al-Nashiri*, 791 F.3d at 74-75.

In practice, the large majority of the CMCR's judges have been military officers who were also serving as appellate military judges on a CCA. *In re Khadr*, 823 F.3d 92, 96 (D.C. Cir. 2016). Because of the specialized nature of the CMCR's jurisdiction, there are times when "the Court's judges may have very little to do." *Ibid.* "Consistent with that reality, the military judges who serve on the [CMCR] also continue to serve on the [CCAs] from which they are drawn." *Ibid.*

C. The *al-Nashiri* Litigation

1. In November 2014, a military-commission defendant, Abd Al-Rahim Hussein Muhammed al-Nashiri, petitioned the D.C. Circuit for a writ of mandamus seeking disqualification of the military CMCR judges hearing an interlocutory appeal in his case. *al-Nashiri*, 791 F.3d at 73, 75. al-Nashiri contended that the judges were placed on the CMCR in violation of the Appointments Clause, which provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint" the "Officers of the United States," but that "Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const. Art. II, § 2, Cl. 2. al-Nashiri argued that CMCR judges are principal officers rather than inferior officers, and that they therefore must be appointed to the CMCR by the President with the advice and consent of the Senate, rather than being assigned by the Secretary of Defense. *al-Nashiri*, 791 F.3d at 75.

The D.C. Circuit denied the mandamus petition, holding that al-Nashiri had not established a "clear and indisputable" right to relief. *al-Nashiri*, 791 F.3d at 85-86. The court did not decide whether CMCR judges are principal officers. *Ibid.* It also did not decide whether, if they are, the Appointments Clause requires judges who have already been appointed as commissioned military officers by the President with the advice and consent of the Senate to be appointed a second time specifically to the CMCR. *Ibid.* The court described those as "open questions." *Id.* at 85. But the court suggested that "the President and the Senate could decide to put to rest any Appointments Clause questions" by nominating and confirming the military judges to the CMCR. *al-Nashiri*, 791 F.3d at 86.

2. "The President chose to take that tack" as a prophylactic measure, without conceding it was constitutionally required. *In re al-Nashiri*, 835 F.3d 110, 116 (D.C. Cir. 2016), cert. denied, No. 16-8966 (Oct. 16, 2017). On March 14, 2016, the President submitted nominations to the Senate ratifying the Secretary of Defense's assignments of the appellate military judges serving on the CMCR. Those nominations clarified that, although the judges were being appointed by the President under Section 950f(b)(3), they would continue to be governed by the statutory provisions applicable to "appellate military judges" serving on the CMCR. The President nominated:

> The following named officers for appointment in the grades indicated in the United States Army [or Air Force] as appellate military judges on the [CMCR] under Title 10 U.S.C. Section 950f(b)(3). In accordance with their continued status as appellate military

> judges pursuant to their assignment by the Secretary of Defense under 10 U.S.C. Section 950f(b)(2), while serving on the [CMCR], all unlawful influence prohibitions remain under 10 U.S.C. Section 949b(b).

162 Cong. Rec. S1474 (Mar. 14, 2016).

The nominated judges included Air Force Colonel Martin Mitchell, Army Colonels Larss Celtnieks and James Herring, and Army Lt. Colonel Paulette Burton. 162 Cong. Rec. at S1474. The Senate confirmed their nominations on April 28, 2016. 162 Cong. Rec. S2600. On May 2, 2016, the judges took new oaths of office. J.A. 179, 181, 183, 185. And on May 25, 2016, the President appointed the judges to the CMCR by signing their commissions. J.A. 180, 182, 184, 186.

3. al-Nashiri responded to those developments by seeking to disqualify the military judges on his CMCR panel on a new ground. J.A. 173. He invoked 10 U.S.C. 973(b)(2), which provides that, unless "otherwise authorized by law," a military officer may not hold certain "civil office[s]," including a "civil office" that "requires an appointment by the President by and with the advice and consent of the Senate." 10 U.S.C. 973(b)(2)(A)(ii). al-Nashiri argued that Section 973(b) bars military officers from being appointed as CMCR judges. J.A. 173.

The CMCR denied the motion on two independent grounds. J.A. 170-176. First, it held that military officers are "authorized by law" to serve on the CMCR because 10 U.S.C. 950f(b)(2) specifically provides for military officers to be judges on the court. J.A. 174. Second, the CMCR held that a CMCR judgeship is not a "civil office" for purposes of Section 973(b) because "[d]isposition of violations of the law of war by military commissions is a classic military function." J.A. 175; see J.A. 151-169 (rejecting a similar challenge in another case).

D. The Present Controversy

Petitioners are eight servicemembers who were convicted of a variety of offenses before courts-martial. The CCAs affirmed their convictions and sentences in whole or in part. In each case, the CCA panel included Judge Burton, Judge Celtnieks, Judge Herring, or Judge Mitchell. All petitioners sought discretionary review by the CAAF.

1. Dalmazzi *and* Cox

In *Dalmazzi*, the CAAF granted review to decide whether the President's appointment of Judge Mitchell to the CMCR had rendered him ineligible to continue sitting on the CCA. J.A. 14-15. During briefing, the CAAF noted that the record did not disclose the date of Judge Mitchell's appointment to the CMCR and ordered the parties to submit the relevant documents. J.A. 13. When those documents revealed that Judge Mitchell was not appointed until after the CCA had issued its decision, the CAAF ordered the parties to brief the question "whether the issues granted for review are moot." J.A. 11.

After receiving the parties' briefs, the CAAF "vacated" its order granting review and entered an order stating that the "petition for grant of review is denied." J.A. 10. The CAAF explained that it had granted review to decide "whether a military officer is statutorily or constitutionally prohibited from simultaneously serving" on a CCA and as a presidentially-appointed judge on the CMCR. J.A. 6. The CAAF noted that a presidential appointment is not complete until the President "perform[s] some public act that evinces the appointment," usually by "sign[ing] a commission." J.A. 9-10. And because Judge Mitchell "had not yet been appointed" when the CCA acted, the CAAF stated that the

case was "moot as to [the simultaneous-service] issues" on which it had granted review. J.A. 6, 10.

After denying review in *Dalmazzi*, the CAAF issued similar orders as to all six petitioners in *Cox*, whose CCA panels likewise had issued decisions before the judges were appointed to the CMCR. J.A. 26, 38, 43, 100, 105, 119. As in *Dalmazzi*, each order "vacated" the CAAF's prior order granting discretionary review and "denied" the petition for review. *Ibid.*

2. **Ortiz**

In *Ortiz*, unlike the other cases, the CCA had issued its decision after the President appointed Judge Mitchell to the CMCR. The CAAF therefore decided the simultaneous-service issues on the merits, affirming the CCA's decision. J.A. 132-143.

The CAAF first held that even if a CMCR judgeship were a "civil office" subject to Section 973(b), and even if military officers were not "authorized by law" to serve on the CMCR, any violation of Section 973(b) would not affect Judge Mitchell's service on the CCA. J.A. 139. The CAAF observed that although Section 973(b) prohibits military officers from holding certain civil offices, it does not "operate[] to automatically effectuate [the] termination" of an officer who accepts a prohibited office. *Ibid.* To the contrary, the CAAF noted that language mandating that result had been "repealed over thirty years ago," when Congress rewrote Section 973(b) in 1983. *Ibid.* And the CAAF emphasized that its conclusion was confirmed by a savings clause Congress added when it repealed the automatic-termination language. J.A. 139. That clause provides that "[n]othing in [Section 973(b)] shall be construed to invalidate any action undertaken by an officer in furtherance of assigned official duties." 10 U.S.C. 973(b)(5).

The CAAF next held that an officer's simultaneous service on a CCA and the CMCR does not violate the Appointments Clause. J.A. 140-143. The CAAF assumed without deciding that CMCR judges are principal officers. J.A. 142-143. But the CAAF rejected the argument that it would violate the Appointments Clause for Judge Mitchell to serve as a principal officer on the CMCR while separately serving as a CCA judge, which is an inferior office. J.A. 141-142. The court explained that the argument "presum[ed] that [Judge Mitchell's] status as a principal officer on the []CMCR somehow carries over to the CCA, and invests him with authority or status not held by ordinary CCA judges." J.A. 141. The CAAF rejected that argument, explaining that "[w]hen [Judge Mitchell] sits as a CCA judge, he is no different from any other CCA judge." *Ibid.*

SUMMARY OF ARGUMENT

I. The President's appointments of Judges Burton, Celtnieks, Herring, and Mitchell to the CMCR did not violate 10 U.S.C. 973(b). And even if they did, petitioners would not be entitled to relief from the CCA decisions affirming their convictions because Congress specifically provided that Section 973(b) does not invalidate the subsequent actions of a military officer who accepts a covered civil office.

A. Section 973(b) states that military officers may not hold certain "civil office[s]" unless they are "authorized by law" to do so. That statute does not bar the President from appointing military officers to the CMCR for two independent reasons.

First, a CMCR judgeship is not a "civil office." The CMCR is a military court modeled on the CCAs. Like the CCAs' review of courts-martial, the CMCR's review of military commissions is a military function that has

long been performed by military officers. Accordingly, just as this Court has held that "the role of military judge [on a CCA] is 'germane' to that of military officer," *Weiss* v. *United States*, 510 U.S. 163, 176 (1994), the role of a military judge on the CMCR is likewise a military position, not a prohibited "civil office."

Second, military officers are authorized by law to serve on the CMCR because Congress provided that the Secretary of Defense may assign "commissioned officer[s]" to be "judges on the [CMCR]." 10 U.S.C. 950f(b)(2). Petitioners deem that authorization insufficient because Section 950f(b)(3), which allows the President to appoint "additional judges to the [CMCR]," does not expressly mention military officers. But petitioners err in presuming that assigned and appointed judges hold two different "offices" for purposes of Section 973(b). By specifying that "[j]udges on the [CMCR] shall be assigned *or* appointed," 10 U.S.C. 950f(b)(1) (emphasis added), Congress made clear that both assigned and appointed judges hold the same office. Congress has thus authorized military officers to hold the single office it created in Section 950f.

B. Even if Section 973(b) prohibited the President from appointing military officers to the CMCR, there would be no basis for petitioners' remarkable assertion that the President's appointment of Judges Burton, Celtnieks, Herring, and Mitchell automatically terminated those judges from the military and voided the CCAs' decisions. Congress repealed language imposing an automatic-termination consequence in 1983 and replaced it with a broad savings clause directing that Section 973(b) may not be "construed to invalidate any action undertaken by an officer in furtherance of assigned official duties." 10 U.S.C. 973(b)(5). Here, the judges

decided petitioners' appeals "in furtherance of [their] assigned official duties" on the CCAs. The savings clause thus unambiguously forecloses petitioners' attempt to invoke Section 973(b) to "invalidate" the CCAs' decisions.

II. A military officer's simultaneous service on a CCA and the CMCR does not raise questions under the Appointments Clause or the Commander-in-Chief Clause. Petitioners identify nothing in the text or history of the Appointments Clause, or in this Court's decisions, to support their assertion that the Clause imposes an ill-defined "incompatibility" or "incongruity" limitation on the circumstances in which an individual may hold two separate federal offices. And even if such a limit existed, it would not be implicated here. A military judge's simultaneous service on a CCA and the CMCR is no more "incongruous" or "incompatible" than a district judge's service on the Foreign Intelligence Surveillance Court or a circuit judge's service on a three-judge district court. And petitioners' argument that the Commander-in-Chief Clause does not permit the restrictions on removal that petitioners assume are triggered by presidential appointment to the CMCR rests on the erroneous premise that Judges Burton, Celtnieks, Herring, and Mitchell are not subject to 10 U.S.C. 949b(b)(4), the statutory provision governing reassignment of military judges serving on the CMCR.

III. This Court lacks jurisdiction in *Dalmazzi* and *Cox*, but has jurisdiction in *Ortiz*.

A. Under 28 U.S.C. 1259(3), this Court's jurisdiction is limited to cases in which the CAAF "granted a petition for review." Section 1259(3) does not apply in *Dalmazzi* and *Cox* because the CAAF "vacate[d]" its orders granting review and "denied" the petitions. J.A. 10. That understanding is confirmed by 10 U.S.C.

867a(a), which expressly provides that this Court may not review "any action" by the CAAF "in refusing to grant a petition for review."

B. An amicus brief filed by Professor Bamzai argues that Section 1259 is an unconstitutional expansion of this Court's original jurisdiction and that the Court therefore lacks jurisdiction in all three cases. That is not correct. Congress has validly granted this Court appellate jurisdiction to review the decisions of the non-Article III courts Congress has created under its broad authority over federal territories and the District of Columbia. For the same reason, Section 1259 is a valid grant of appellate jurisdiction over the decisions of the CAAF—a court created pursuant to Congress's comparably broad authority to "make Rules for the Government and Regulation of the land and naval Forces," U.S. Const. Art. I, § 8, Cl. 14.

IV. If the Court concludes that it has jurisdiction in *Dalmazzi* and *Cox*, it should not disturb the CAAF's discretionary denials of review. The CAAF did not abuse its discretion in vacating its grants of review and denying the petitions in those cases when it discovered that the questions it had agreed to decide were not squarely presented.

ARGUMENT

I. PETITIONERS ARE NOT ENTITLED TO RELIEF UNDER 10 U.S.C. 973(b)

Petitioners' principal claim rests on 10 U.S.C. 973(b), which provides that military officers may not hold certain "civil office[s]" unless they are "authorized by law" to do so. Petitioners assert that although Congress authorized military officers to be *assigned* to the CMCR by the Secretary of Defense, Section 973(b) bars the same military officers from being *appointed* to the

CMCR by the President. Petitioners further assert that when the President appointed Judges Burton, Celtnieks, Herring, and Mitchell, Section 973(b) automatically terminated them from the military and rendered them ineligible to serve on the CCA panels that decided petitioners' appeals.

Both steps of petitioners' argument are unsound. Section 973(b) does not prohibit military officers from serving on the CMCR because a CMCR judgeship is not a "civil office" within meaning of Section 973(b), and because military officers are in any event "authorized by law" to serve on the court. And even if that were not so, nothing in Section 973(b) supports petitioners' assertion that officers who accept covered civil offices are automatically terminated from the military, voiding their subsequent actions. In seeking that startling result, petitioners ask this Court to re-impose a consequence that Congress deleted from the statute in 1983 and to ignore Congress's express directive that Section 973(b) may not "be construed to invalidate any action undertaken by an officer in furtherance of assigned official duties." 10 U.S.C. 973(b)(5).

A. Section 973(b) Does Not Prohibit Military Officers From Serving On The CMCR

Congress created the CMCR as a military court, patterned after the CCAs, and it specifically authorized the Secretary of Defense to assign military officers to be CMCR judges. When the D.C. Circuit suggested that the officers' assignments to the CMCR raised questions under the Appointments Clause, the President and the Senate acted to eliminate those questions by nominating and confirming the officers to the same positions. The officers did not violate Section 973(b) by accepting the President's appointments.

1. A CMCR judgeship is not a "civil office" within the meaning of Section 973(b)

a. The bar to civil office-holding now codified at 10 U.S.C. 973(b) was first enacted in 1870. In its original form, it imposed a broader prohibition and carried the draconian consequence of automatic termination from the military upon acceptance of a civil office:

> [I]t shall not be lawful for any officer of the army of the United States on the active list to hold any civil office, whether by election or appointment, and any such officer accepting or exercising the functions of a civil office shall at once cease to be an officer of the army, and his commission shall be vacated thereby.

Act of July 15, 1870, ch. 294, § 18, 16 Stat. 319 (1870 Act).

In enacting that provision, Congress sought to "assure civilian preeminence in government" by preventing "the military establishment from insinuating itself into the civil branch of government and thereby growing 'paramount' to it." *Riddle* v. *Warner*, 522 F.2d 882, 884 (9th Cir. 1975). For example, one Senator explained that "the theory of our Government is that the military should be separate from and subordinate to the civil authority." Cong. Globe, 41st Cong., 2d Sess. 3398 (1870) (Sen. Williams). Another observed that "civil offices of the country" should not be "administered by the military authorities." *Id.* at 3395 (Sen. Trumbull).[2]

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[2] See Memorandum from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, to William P. Tyson, Director, Executive Office for United States Attorneys, *Re: Applicability of 10 U.S.C. § 973(b) to JAG Officers Assigned to Prosecute Petty Offenses Committed on Military Reservations* 9-17 (May 17, 1983) (Olson Mem.) (summarizing legislative history), https://www.justice.gov/olc/page/file/965131/download.

Congress carried forward the 1870 statute's basic prohibition, with minor amendments, for the next century. Olson Mem. 16 n.22. In 1968, the prohibition was codified as Section 973(b) and expanded to reach all military officers, not just those in the Army. Act of Jan. 2, 1968, Pub. L. No. 90-235, § 4(a)(5), 81 Stat. 759. Over the years, Congress also enacted a variety of statutes authorizing military officers to hold specific civil offices notwithstanding the general prohibition. Olson Mem. 16-17 n.21 (collecting statutes).

In 1983, the Office of Legal Counsel (OLC) concluded that Section 973(b) prohibited the "widespread" practice of appointing military lawyers to be Special Assistant U.S. Attorneys in the Department of Justice so that they could prosecute petty civil crimes on military reservations. Olson Mem. 1-3, 5-6. OLC concluded that the lawyers were performing a "civil" function because they were prosecuting "offenses against the civil laws of the United States" and acting under the authority of "the Attorney General" rather than any "military source." *Id.* at 29; see *id.* at 7.

Congress responded to OLC's determination by "completely rewrit[ing]" Section 973(b). S. Rep. No. 174, 98th Cong., 1st Sess. 233 (1983); see Department of Defense Authorization Act, 1984, Pub. L. No. 98-94, Tit. X, Pt. A, § 1002, 97 Stat. 655-656 (1983 Amendment). Section 973(b) now provides that "[e]xcept as otherwise authorized by law," a military officer "may not hold, or exercise the functions of, a civil office in the Government of the United States" that is "an elective office," that "requires an appointment by the President by and with the advice and consent of the Senate," or that is in the Executive Schedule set forth in 5 U.S.C. 5312-5317. 10 U.S.C. 973(b)(2)(A). Section 973(b) also generally

prohibits military officers from holding a "civil office" in a state or local government. 10 U.S.C. 973(b)(3).

Because Section 973(b) does not define "civil office," that term must be construed "in accord with its ordinary or natural meaning." *Smith* v. *United States*, 508 U.S. 223, 228 (1993). In this context, the natural meaning of "civil" is "non-military." 3 *Oxford English Dictionary* 255 (2d ed. 1989); see, *e.g.*, Robert Gordon Latham, *A Dictionary of the English Language* 252 (1876) ("not military"); James Stormonth, *A Dictionary of the English Language* 169 (1895) ("ordinary life as distinguished from military"). That natural meaning accords with Section 973(b)'s purpose of preserving the "separation of the military and civilian establishment[s]." Olson Mem. 16. DOD has adopted the same understanding in exercising its authority to "prescribe regulations to implement" Section 973. 10 U.S.C. 973(d). Under those regulations, a "civil office" is "[a] non-military office involving the exercise of the powers or authority of civil government." DOD Directive No. 1344.10 § E2.3 (Feb. 19, 2008) (Directive 1344.10) (App., *infra*, 19a-23a).

b. A CMCR judgeship is not a "civil office" under Section 973(b) because review of military commissions, like review of courts-martial, is a military function. This Court has recognized that the use of military commissions to try enemy belligerents is "[a]n important incident to the conduct of war" that "may constitutionally be performed by the *military arm* of the nation in time of war." *Ex parte Quirin*, 317 U.S. 1, 28 (1942) (emphasis added); see *Hamdan* v. *Rumsfeld*, 548 U.S. 557, 596-598 (2006) (plurality opinion). "Following the analogy of courts-martial, military commissions in this country have invariably been composed of commissioned offic-

ers." Winthrop 835. And, like courts-martial, convictions before military commissions were traditionally subject to review by the convening officer. *Id.* at 846. Accordingly, as the CMCR explained in *al-Nashiri*, "[d]isposition of violations of the law of war by military commissions is a classic military function." J.A. 175.

Consistent with that tradition, the MCA establishes a system of military commissions to try alien unprivileged enemy belligerents for law-of-war offenses committed in the context of hostilities against the United States. 10 U.S.C. 948b(a)-(b), 948c, 950p(c). The MCA's procedures are "based upon" and largely consistent with the procedures governing general courts-martial under the UCMJ. 10 U.S.C. 948b(c). Like a general court-martial, a military commission is presided over by a "military judge," who must be "a commissioned officer of the armed forces." 10 U.S.C. 948j(a)-(b); see 10 U.S.C. 826(a)-(b). And like a general court-martial, a military commission is composed of between five and 12 "commissioned officers." 10 U.S.C. 948i(a), 948m(a), 949m(c); see 10 U.S.C. 816(1), 825, 825a.

As particularly relevant here, the MCA's "review structure" is "virtually identical to the review system for courts-martial." *In re al-Nashiri*, 835 F.3d 110, 122 (D.C. Cir. 2016), cert. denied, No. 16-8966 (Oct. 16, 2017). "The 'scope of the CMCR's post-conviction review is a word-for-word copy' of the portion of the UCMJ that sets out the authority of each service's [CCA], the military body that reviews court-martial convictions." *Ibid.* (citation omitted); see 10 U.S.C. 866(c)-(d), 950f(d)-(e).

Like their counterparts on the CCAs, therefore, CMCR judges do not exercise "the powers or authority of civil government." Directive 1344.10 § E2.3. And for

the same reason, the presence of military officers on the CMCR poses no threat to "civilian preeminence" in government. *Riddle*, 522 F.2d at 884.

c. This Court's decision in *Weiss* v. *United States*, 510 U.S. 163 (1994), confirms that CMCR judges perform a military function. In *Weiss*, the Court noted that military judges on CCAs are selected by Judge Advocates General, a method that does not itself comply with the Appointments Clause. *Id.* at 168-169. But the Court nonetheless held that the Clause was satisfied because the judges "were already commissioned officers when they were assigned" and thus "had already been appointed by the President with the advice and consent of the Senate" to their military offices. *Id.* at 170.

In so holding, the Court assumed without deciding that the officers' prior appointments would satisfy the Appointments Clause for their new CCA positions only if the duties of a CCA judge were "germane" to their military offices. *Weiss*, 510 U.S. at 173-174. The Court had little difficulty concluding that any germaneness requirement was satisfied, because "all military officers, consistent with a long tradition, play a role in the operation of the military justice system." *Id.* at 174-175. Among other things, officers convene, serve on, and review courts-martial. *Id.* at 175.

The Court's reasoning in *Weiss* applies equally here. Like courts-martial, military commissions are part of the "military justice system" in which "all military officers, consistent with a long tradition, play a role." *Weiss*, 510 U.S. at 175. And just as "the role of military judge is 'germane' to that of military officer" when the judge serves on a CCA, *id.* at 176, it is also germane when the judge serves in a functionally equivalent role on the CMCR. That germaneness to an officer's military role

confirms that a CMCR judgeship is not a "civil office" within the meaning of Section 973(b).

d. Petitioners provide no sound reason to question that conclusion.

First, petitioners assert that opinions by OLC, the Attorney General, and the Comptroller General have adopted a "very broad" interpretation of the term "civil office." Pet. Br. 31 (citation omitted). But those opinions primarily addressed positions that were obviously non-military, and they thus described the breadth of the term "office"—not the meaning of "civil."[3] The Olson Memorandum, for example, readily concluded that "[t]he prosecution of offenses committed by persons not subject to the [UCMJ] seems clearly a 'civil' function," and devoted the bulk of its analysis to determining the meaning of "the statutory term '*office*.'" Olson Mem. 7-8 (emphasis added). Petitioners thus err in reading (Br. 32) the Olson Memorandum to conclude that a "civil office" includes any office that is "established by statute" and that "involve[s] the exercise of 'some portion of the sovereign power.'" Olson Mem. 24. That test

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[3] Petitioners rely (Br. 31 n.19) on a portion of the Olson Memorandum citing opinions addressing Section 973(b) and its predecessors. With one exception discussed below, see p. 24, *infra*, the offices at issue were obviously civil: "park commissioner"; "trustee of the Cincinnati Southern Railway"; member of a city board to report to the mayor "on street paving"; "Indian agents"; work for "the United States Geological Survey"; "duties in connection with World's Columbian Commission"; "President of the Louisiana State University"; "state notary public"; "special policeman for the Library of Congress"; "Commissioner of Roads for Alaska"; manager of a "state highway construction project"; officer with the "United Nations Relief and Relocation Administration"; "civil positions in the Panama Canal Zone"; and commissioner on the "Alaskan Engineering Commission." Olson Mem. 18-24 & nn.23-28.

identifies governmental "offices." But unless it is limited to *non-military* offices, it would sweep in many positions that are military rather than civil—including, for example, the Army Chief of Staff, Vice Chief of Staff, Deputy Chief of Staff, Assistant Chiefs of Staff, Chief of Engineers, and Judge Advocate General. 10 U.S.C. 3033(a)(1), 3034(a), 3035(a), 3036(a)(1)-(2).

An 1893 Attorney General opinion confirms that Section 973(b) does not reach statutory offices performing military functions. The Attorney General was asked whether officers were terminated from the Army upon appointment to the California Débris Commission, a body under the "direction of the Secretary of War." *California Débris Commission—Civil Office*, 20 Op. Att'y Gen. 604, 604 (1893) (citation omitted). In addition to concluding that the statute creating the Commission allowed the appointment of military officers, the Attorney General also determined that because the commissioners "act[ed] under the direction of the Secretary of War" and "belong[ed] to the War Department," "[t]hey d[id] not, within the meaning of [Section 973(b)'s predecessor], hold any civil office." *Id.* at 605. The Attorney General thus concluded that the officers remained members of the Army, "merely detailed upon special duty, although the detail is to be effected by the President and the Senate." *Id.* at 606; see Olson Mem. 20 n.24. The same is true here.[4]

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[4] Petitioners observe (Br. 31) that the Secretaries of the Army, the Navy, and the Air Force hold civil offices even though they perform functions related to the military. But that is because, regardless of their functions, Congress has expressly provided that those officers must be "appointed from civilian life." 10 U.S.C. 3013(a)(1),

Second, petitioners emphasize (Br. 32) that "civilians can (and do) serve as CMCR judges." Petitioners assert (Br. 31) that "even [an office] with military functions" is a "civil office" under Section 973(b) "so long as the office can be held *by* civilians." But that proves too much. It would mean, for example, that a CCA judgeship—a position this Court has deemed "germane" to the position of military officer, *Weiss*, 510 U.S. at 176—is a "civil office" because it can be held by "civilians." 10 U.S.C. 866(a). As it did with CCAs, Congress provided that civilians may serve on the CMCR. 10 U.S.C. 950f(b)(3). But it did not require the President to appoint any particular number of civilians, or any civilians at all, and the large majority of judges on the court have been military officers. *In re Khadr*, 823 F.3d 92, 96 (D.C. Cir. 2016). The possibility that a civilian may hold an office with such military functions does not transform it into a prohibited "civil office."

Third, petitioners assert (Br. 33) that the CMCR primarily focuses on "*domestic* law" rather than the law of war or other military matters. That is not correct. The CMCR was established to "review[] decisions of military commissions." 10 U.S.C. 950f(a). The persons subject to trial by military commission are "alien unprivileged enemy belligerent[s]." 10 U.S.C. 948c. The MCA, by its terms, codifies "offenses that have traditionally been triable under the law of war or otherwise triable by military commission." 10 U.S.C. 950p(d). Thus, like

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5013(a)(1), 8013(a)(1) (Supp. IV 2016); see 10 U.S.C. 113(a) (same requirement for the Secretary of Defense).

CCAs, the CMCR hears "matters as to which the expertise of military courts is singularly relevant." *Schlesinger* v. *Councilman*, 420 U.S. 738, 760 (1975).[5]

Fourth, petitioners briefly suggest (Br. 33-34) that the "novelty" of formal appellate review of military commissions means that such review cannot be a military function. The appellate review conducted by the CCAs was likewise a relative innovation, yet this Court did not hesitate to place it in the "long tradition" of military officers "play[ing] a role in the operation of the military justice system." *Weiss*, 510 U.S. at 175. And although formal appellate oversight is new, military officers have long reviewed military-commission proceedings. During and immediately following the Civil War, for example, the Army Judge Advocate General's office reviewed the records of proceedings in 75,992 courts-martial, military commissions, and courts of inquiry and prepared 21,961 reports and opinions. See W. McKee Dunn, *A Sketch of the History and Duties of the Judge Advocate General's Department, United States Army, Washington, D.C.* 15 (1878).[6]

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[5] For example, the central issue in the case on which petitioners rely (Br. 33) was whether conspiracy to commit war crimes could be tried in a law-of-war military commission. *United States* v. *Al Bahlul*, 820 F. Supp. 2d 1141, 1225-1227 (C.M.C.R. 2011) (en banc). Answering that question required examining, among other things, "the deeply rooted history of U.S. military commission trials of the offense of conspiracy." *Bahlul* v. *United States*, 840 F.3d 757, 766-767 (D.C. Cir. 2016) (en banc) (Kavanaugh, J., concurring), cert. denied, No. 16-1307 (Oct. 10, 2017).

[6] During World War II, the Army Judge Advocate General continued to review military trials. In certain cases, he was aided by a "board of review consisting of not less than three officers of the Judge Advocate General's Department," which examined the record

2. Military officers are "authorized by law" to serve as CMCR judges

Because a CMCR judgeship is not a "civil office," Section 973(b) would not disable military officers from serving on the court even if Congress had been silent about who is eligible to serve. But Congress was not silent. It specifically provided that "the Secretary of Defense may assign persons who are appellate military judges to be judges on the [CMCR]" and that "[a]ny judge so assigned shall be a commissioned officer of the armed forces." 10 U.S.C. 950f(b)(2). In light of that express authorization, Section 973(b) does not bar military officers from serving as judges on the CMCR for the additional reason that military officers are "authorized by law" to serve in that capacity. 10 U.S.C. 973(b)(2)(A).

a. Petitioners concede (Br. 40) that Section 950f(b)*(2)* "expressly indicate[s]" that military officers may serve as "judges" on the CMCR. But they maintain (Br. 40-41) that similar authorization is absent from Section 950f(b)*(3)*, which allows the President to "appoint, by and with the advice and consent of the Senate, additional judges" to the CMCR. Petitioners' claim thus hinges on the proposition that an "additional judge" appointed under Section 950f(b)(3) and a "judge" assigned under Section 950f(b)(2) hold two different offices.

In fact, Section 950f establishes only one office: "judge[] on the [CMCR]." 10 U.S.C. 950f(a). The Secretary of Defense may assign appellate military judges "to be judges on the [CMCR]," and the President may

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and submitted "its opinion, in writing, to the Judge Advocate General." Act of June 4, 1920, ch. 227, 41 Stat. 797. Although by statute this procedure applied only to general courts-martial, the President directed that it be followed for military commissions convened in the United States during 1945. 10 Fed. Reg. 549 (Jan. 16, 1945).

appoint "additional judges to the [CMCR]." 10 U.S.C. 950f(b)(1)-(3). But by specifying that "[j]udges on the Court shall be assigned *or* appointed," 10 U.S.C. 950f(b)(1) (emphasis added), Congress made clear that both assigned and appointed judges hold the same office —"[j]udge[] on the Court."

The same was true in *Edmond* v. *United States*, 520 U.S. 651 (1997). There, this Court held that judges on the Coast Guard CCA could either be assigned by the Judge Advocate General or appointed by the Secretary of Transportation. *Id.* at 657-658. Under the Appointments Clause, the Judge Advocate General's power to assign applied only to commissioned officers who had previously been appointed by the President with the advice and consent of the Senate, whereas the Secretary's power to appoint extended to civilians. *Ibid.* But despite those two modes of selection, the relevant statute creates only a single office—"appellate military judge[]" on the Coast Guard CCA. 10 U.S.C. 866(a).

b. Petitioners do not deny that *all* CMCR judges—assigned and appointed—are "'substantively identical' in terms of their duties." Br. 41 (citation omitted). Petitioners nevertheless argue (Br. 35-36, 40-41) that assigned and appointed judges hold two different "offices" because they are selected and may be removed via different mechanisms. The mechanisms by which individuals are placed in and removed from an office are highly relevant under the Appointments Clause. See, *e.g.*, *Edmond*, 520 U.S. at 657. But the question here is statutory, not constitutional: it is whether, under Section 972(b), Congress has "authorized by law" military officers to serve in the asserted "civil office." That question is resolved by Congress's decisions (1) to define a single statutory office, "judge[] on the [CMCR]," 10 U.S.C.

950f(a), and (2) to authorize "commissioned officer[s] of the armed forces" to fill that office, 10 U.S.C. 950f(b)(2).

Petitioners speculate (Br. 41) that "Congress may have had very good reasons" to permit military officers to be assigned to be CMCR judges without allowing them to be appointed to the same position. But the reasons petitioners hypothesize are far removed from the purpose of Section 973(b), which was to preserve the separation between civil and military functions and to "assure civilian preeminence in government." *Riddle*, 522 F.2d at 884. If those objectives are not threatened by a military officer's service as a CMCR judge pursuant to an assignment, they also are not threatened when the same officer holds the same office and performs the same functions pursuant to an appointment by the President.

c. Even if removal mechanisms were relevant under Section 973(b), petitioners' arguments would be misplaced here. Petitioners note (Br. 35-36) that Congress specified that an "appellate military judge" serving on the CMCR may be reassigned to other duties under 10 U.S.C. 949b(b)(4).[7] Petitioners also note (Br. 36 n.23) that, although the MCA does not expressly address the issue, the D.C. Circuit has recognized that a *civilian* appointed to the CMCR "may be removed by the President only for cause and not at will"—though the court did not have occasion to elaborate on what would constitute "cause" in this context. *Khadr*, 823 F.3d at 98. But

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[7] Section 949b(b)(4) authorizes reassignment if a judge "voluntarily requests to be reassigned," separates from service, is reassigned by the Secretary of Defense or his designee "based on military necessity," or is withdrawn from the CMCR by the Secretary or his designee "for good cause." 10 U.S.C. 949b(b)(4); see *al-Nashiri*, 791 F.3d at 83-84 ("[W]e would likely give the Executive Branch substantial discretion to determine what constitutes military necessity.").

petitioners err in assuming (Br. 35-36, 41) that, as a result of their presidential appointments, Judges Burton, Celtnieks, Herring, and Mitchell were made removable only under the standard applicable to civilians, and not under the procedures applicable to "appellate military judges" under Section 949b(b)(4). The President's nominations clarified that the judges would have "continued status as appellate military judges" and would remain subject to "Section 949b(b)." 162 Cong. Rec. S1474 (Mar. 14, 2016). The judges' commissions likewise specify that they continue to be "Appellate Military Judges." J.A. 180, 182, 184, 186. Accordingly, notwithstanding their presidential appointments, the judges remained subject to reassignment under Section 949b(b).

* * * * *

When it enacted the MCA in 2009, Congress unambiguously intended for military officers to serve on the CMCR. After the D.C. Circuit concluded that the Secretary of Defense's assignment of military officers to the CMCR raised questions under the Appointments Clause, the President and the Senate heeded the D.C. Circuit's suggestion that they "put to rest any Appointments Clause questions" by "re-nominating and reconfirming the military judges to be *CMCR judges.*" *In re al-Nashiri*, 791 F.3d 71, 86 (2015). This Court should reject petitioners' assertion that Section 973(b) barred that sensible course of action by the Political Branches.[8]

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[8] Petitioners contend (Br. 37-39) that CMCR judges are principal officers and that the Appointments Clause therefore requires that they be appointed to the CMCR by the President with the advice and consent of the Senate. The government took the opposite view in *al-Nashiri*. See *Ortiz* Br. in Opp. 13. But the CAAF did not reach that issue, J.A. 142-143, and this Court likewise need not and should

B. Even If Section 973(b) Prohibited Military Officers From Serving On The CMCR, Congress Expressly Foreclosed The Relief Petitioners Seek

Section 973(b) provides that military officers "may not hold, or exercise the functions of," certain civil offices, but it does not itself prescribe a consequence if an officer accepts an appointment to a covered office. Petitioners nonetheless insist (Br. 42, 49) that the President's appointments of Judges Burton, Celtnieks, Herring, and Mitchell "resulted in their immediate termination from the military—thereby disqualifying them from continuing to serve on the CCAs" and rendering "all CCA decisions in which they participated" after the appointments "void." Congress has foreclosed that result.

1. As originally enacted in 1870, Section 973(b)'s predecessor provided that any officer who accepted a covered civil office would "at once cease to be an officer of the army." 1870 Act, § 18, 16 Stat. 319. The precise language was amended over the next century, but until 1983 the statute continued to direct that "[t]he ac-

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not resolve in these cases any of the "several questions of first impression" implicated by petitioners' contention. *al-Nashiri*, 791 F.3d at 85; see *id.* at 82-85 (surveying the relevant issues). As the foregoing discussion makes clear, petitioners' Section 973(b) claim turns on two questions: (1) whether a CMCR judgeship is a "civil office" within the meaning of Section 973(b); and (2) if so, whether assigned and appointed CMCR judges hold different "offices" for purposes of that statute. Neither of those statutory questions turns on whether CMCR judges are principal officers. And particularly because the President nominated and the Senate confirmed the military judges to the CMCR specifically to obviate the need to answer the constitutional questions the D.C. Circuit identified, this Court should not address those questions here. See *Ashwander* v. *TVA*, 297 U.S. 288, 346-347 (1936) (Brandeis, J., concurring).

ceptance of such a civil office or the exercise of its functions by such officer terminates his employment." 10 U.S.C. 973(b) (1982).

When Congress amended the statute in 1983, it completely rewrote Section 973(b), "striking out subsection (b) and inserting in lieu thereof" new language. 1983 Amendment, § 1002(a), 97 Stat. 655. The amendment eliminated any provision for the automatic termination of officers who accept a covered civil office.[9] Instead, Congress enacted an express savings clause directing that "[n]othing in [Section 973(b)] shall be construed to invalidate any action undertaken by an officer in furtherance of assigned official duties." 10 U.S.C. 973(b)(5). Congress otherwise left the remedies for violations to the Secretary of Defense, who was authorized to "prescribe regulations to implement" Section 973. 10 U.S.C. 973(d).

The plain language of Section 973(b)(5)'s savings clause unambiguously forecloses the relief petitioners seek. Officers serving as military judges are "assigned to a [CCA]" by the relevant Judge Advocate General. 10 U.S.C. 866(a); see *Weiss*, 510 U.S. at 172. Judges Burton, Celtnieks, Herring, and Mitchell thus decided petitioners' appeals as part of their "assigned official duties." And petitioners' claim (Br. 49) that the asserted violation of Section 973(b) renders the CCAs' decisions "void" is undeniably an attempt to "invalidate"

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[9] Congress had good reason to abandon automatic termination. During the 1970s, some officers opposed to the Vietnam War had used Section 973(b)'s automatic-termination rule as a "legal loophole" that allowed them to escape further service simply by accepting a minor civil office in a state or local government. Lt. John H. Stassen, *Military Administrative Law: The Civil Office Prohibition*, 26 JAG J. 268, 268 n.2 (1972) (citation omitted); see *id.* at 277 & n.51.

the judges' actions in furtherance of those duties. That should end the inquiry. "[W]here, as here, the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'" *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (citation omitted).

2. Petitioners do not appear to dispute that a natural reading of Section 973(b)(5) forecloses their claim. But they assert (Br. 47) that Section 973(b)(5) "was only meant to have retroactive effect" and has no application to post-1983 events. Petitioners further assert (*ibid.*) that Section 973(b)(5) prohibits only the invalidation of actions taken in the covered civil office, not those taken in furtherance of an officer's military duties. Nothing in the text supports those limitations, and several features of the statute refute them.

Most obviously, Section 973(b)(5) is not, by its terms, retroactive. Instead, Congress specifically addressed pre-1983 events in a separate, uncodified provision that parallels, and is broader than, Section 973(b)(5):

> Nothing in section [10 U.S.C. 973(b)], as in effect before the date of the enactment of this Act, shall be construed—
>
> (1) to invalidate any action undertaken by an officer of an Armed Force in furtherance of assigned official duties; or
>
> (2) to have terminated the military appointment of an officer of an Armed Force by reason of the acceptance of a civil office, or the exercise of its functions, by that officer in furtherance of assigned official duties.

1983 Amendment, § 1002(b), 97 Stat. 655. That parallel uncodified provision specifically addressing pre-1983

events disproves petitioners' assertion that Section 973(b)(5) was intended to have retroactive effect—let alone *exclusively* retroactive effect. Indeed, in light of that provision, petitioners' retroactive-only reading of Section 973(b)(5) would render it superfluous.

There is likewise no merit to petitioners' assertion (Br. 47) that Section 973(b)(5)'s protection for actions taken "in furtherance of assigned official duties" is limited to the officer's actions in the civil office. A military officer's "assigned official duties" plainly include his or her *military* duties—here, service on the CCAs. DOD's implementing regulations confirm that understanding, specifying that "[n]o actions undertaken by a member in carrying out assigned military duties shall be invalidated solely by virtue of such member * * * having held or exercised the functions of a civil office." Directive 1344.10 § 4.6.3.

Finally, petitioners err in suggesting (Br. 46) that if Section 973(b)(5) is interpreted to bar private parties from seeking judicial invalidation of actions taken by officers alleged to have violated Section 973(b), the statute would be deprived "of most of its teeth." In fact, Section 973(b) and its predecessors have been cited in only a handful of judicial decisions, and we are not aware of any case in which a court has relied on those provisions to provide relief to a private party. Cf. Olson Mem. 24. Instead, as the Olson Memorandum illustrates, Section 973(b) has been enforced administratively, in the same manner as countless other regulations of federal personnel that do not give rise to rights enforceable by members of the public.

3. Even if petitioners could clear the hurdle erected by Section 973(b)(5), they would still have to establish that Section 973(b) automatically terminated Judges

Burton, Celtnieks, Herring, and Mitchell from the military upon their acceptance of appointments to the CMCR. In seeking to do so, petitioners acknowledge (Br. 43) that "Congress deleted the automatic termination language from § 973(b)(2) when it amended that provision in 1983." Petitioners provide no valid reason to deny effect to Congress's action.

First, petitioners contend (Br. 42) that the 1983 amendments should not be construed to depart from the "common-law doctrine of incompatibility," under which the holder of an office who accepted an incompatible or forbidden office was deemed to vacate the first office. But even assuming that the doctrine remains viable,[10] the presumption that Congress intends to adhere to common-law rules does not apply "when a statutory purpose to the contrary is evident." *Isbrandtsen Co.* v. *Johnson*, 343 U.S. 779, 783 (1952). Congress's repeal of the automatic-termination provision makes it quite "evident" that Congress intended to abandon that rule. Instead, Congress left it to DOD to determine the appropriate response to violations of Section 973(b). See 10 U.S.C. 973(d). The administrative remedies may include "involuntary discharge or release from active duty." Directive 1344.10 § 4.6.2. But in contrast to the pre-1983 regime, those remedies are now imposed as a

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[10] OLC has applied common-law incompatibility principles—though not the automatic-termination rule—in determining whether an individual may hold two federal offices. See, *e.g.*, *Appointment of Vice Chair of the Fed. Reserve Bd. to Serve Concurrently as Chair of the D.C. Fin. Responsibility & Mgmt. Assistance Auth.*, 22 Op. O.L.C. 109, 115-116 (1998). But OLC has also observed that "it is arguable that [the incompatibility doctrine] has either fallen into desuetude or been repealed by statute." *Id.* at 115 n.14 (quoting a 1983 OLC opinion) (brackets omitted).

result of administrative action by DOD rather than automatically upon acceptance of a covered office. *Ibid.*

Second, petitioners note (Br. 43-44, 48-49) that at the same time it amended Section 973(b), Congress enacted a provision specifying that a military officer could accept a position on the Red River Commission. 1983 Amendment, § 1002(d), 97 Stat. 656. In the portion of that provision on which petitioners rely, Congress further specified that, "[n]otwithstanding the provisions of section 973(b)," the officer's acceptance of that position "shall not terminate or otherwise affect such officer's appointment as a military officer." *Ibid.* Petitioners state (Br. 44) that "there would have been no need" for that language if Congress had eliminated the automatic-termination rule. But there would have been no need for that language even *with* an automatic-termination rule. The statute expressly provided that "the President may appoint a regular officer" to the Red River Commission. *Ibid.* Because a military officer is "authorized by law" to hold that position, the appointment would not violate Section 973(b) in the first place.

Third, petitioners argue (Br. 44-45) that the legislative history of the 1983 amendments does not discuss abolition of the automatic-termination rule. But "[i]t is not the law that a statute can have no effects which are not explicitly mentioned in its legislative history." *Pittston Coal Grp.* v. *Sebben*, 488 U.S. 105, 115 (1988).

Fourth, petitioners state (Br. 45 n.25) that "[t]he government's regulations reinforce the conclusion that immediate separation from the military" remains the automatic consequence of a violation of Section 973(b). In fact, those regulations say the opposite. They provide that servicemembers "affected by the prohibitions against * * * exercising the functions of a civil office

may request retirement (if eligible), discharge, or release from active duty," and that the relevant Secretary "*may* approve these requests, consistent with the needs of the Service." Directive 1344.10 § 4.6.1 (emphases added). Termination thus is not automatic upon the acceptance of the prohibited office; it is expressly made discretionary. And the regulation further specifies that a Secretary may not grant a request for retirement or discharge in several circumstances, such as when the servicemember is "[o]bligated to fulfill an active duty service commitment." *Ibid.*[11]

II. SIMULTANEOUS SERVICE ON A CCA AND THE CMCR DOES NOT RAISE CONSTITUTIONAL QUESTIONS

Petitioners sought this Court's review of the question whether "simultaneous service on both the CMCR and [a CCA] violate[s] the Appointments Clause." *Dalmazzi* Pet. i. Petitioners' merits brief all but abandons the Appointments Clause as a freestanding claim, instead arguing (Br. 50-54) that the asserted need to avoid constitutional questions under the Appointments

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[11] Petitioners err in asserting (Br. 8, 45 n.25) that OLC and DOD have taken the position that Section 973(b) automatically terminates the appointment of an officer who accepts a prohibited civil office. The OLC opinion on which petitioners rely addressed the substantive reach of Section 973(b), not the remedy for a violation. *Whether a Military Officer May Continue on Terminal Leave After He Is Appointed to a Federal Civilian Position Covered by 10 U.S.C. 973(b)(2)(A)*, 40 Op. O.L.C. 1 (2016). The sentence on which petitioners rely was not expressing OLC's view; it was quoting an email from DOD. *Id.* at 3. And while that email stated that Section 973 would "prohibit continuation of military status" after acceptance of a civil office, it did not suggest that Section 973(b) itself would automatically terminate that status. *Ibid.* (citation omitted). The same is true of the 2002 DOD advisory memo (which in any event discussed a now-superseded version of Directive 1344.10).

Clause bolsters their interpretation of Section 973(b). Petitioners also briefly advance an avoidance argument based on the Commander-in-Chief Clause. Those arguments are unpersuasive.

A. Judges Burton, Celtnieks, Herring, and Mitchell were placed in two distinct offices: CCA judge and CMCR judge. As petitioners do not and could not dispute, they were placed in each of those offices in a manner consistent with the Appointments Clause. CCA judges are "inferior Officers." *Edmond*, 520 U.S. at 666. Because military judges are "already commissioned officers" appointed by the President with the advice and consent of the Senate, the Appointments Clause allows them to be assigned to the CCAs without a "second appointment." *Weiss*, 510 U.S. at 170; see *id.* at 176. And even assuming that CMCR judges are principal officers, see note 8, *supra*, the judges have now been appointed to the CMCR by the President with the advice and consent of the Senate. Those appointments "put to rest any Appointments Clause questions." *al-Nashiri*, 791 F.3d at 86.

Petitioners nonetheless contend that it somehow violates the Appointments Clause for a single individual to serve simultaneously as a CCA judge (an inferior office) and as a CMCR judge (a principal office, in petitioners' view). Petitioners assert (Br. 50-52) that simultaneous service on the CMCR and a CCA "might be functionally incompatible" or "incongru[ous]." But petitioners identify nothing in the text or history of the Appointments Clause, or in this Court's decisions, to support their assertion that the Clause imposes such ill-defined "incompatibility" or "incongruity" limits.[12]

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[12] The decisions petitioners do cite are far afield. In *Morrison* v. *Olson*, 487 U.S. 654 (1988), the Court stated that vesting Article III courts with authority to fill an office may be impermissible if there

Even if the Appointments Clause constitutionalized some "incompatibility" or "incongruity" limitation on simultaneous service, it would not be implicated here. The CCAs and the CMCR do not have overlapping jurisdiction, and they do not review each other's decisions. 10 U.S.C. 866, 950f. Placing CCA judges on the CMCR, with its narrower jurisdiction and lighter docket, is analogous to placing Article III judges on specialized Article III courts like the Foreign Intelligence Surveillance Court and the Foreign Intelligence Surveillance Court of Review. 50 U.S.C. 1803(a)-(b). Simultaneous service on the CCA and the CMCR thus would not violate even the common-law incompatibility principle, which applies only if two offices "have the right to interfere, one with the other," or where one of the offices is "subordinate" to the other. Floyd R. Mechem, *A Treatise on the Law of Public Offices and Officers* § 422, at 269-270 (1890) (citation omitted).[13]

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is "some 'incongruity' between the functions normally performed by the courts and their performance of th[at] duty to appoint." *Id.* at 676 (quoting *Ex parte Siebold*, 100 U.S. 371, 398 (1880)). That principle concerns the propriety of a method of appointment—not any "incongruity" in the same individual holding two different offices. In *Nguyen* v. *United States*, 539 U.S. 69 (2003), the Court held that a judge on a territorial court could not sit by designation on a panel of the Ninth Circuit. *Id.* at 71. But the Court relied on a statute requiring that judges sitting by designation be Article III judges—not on the Appointments Clause. *Id.* at 74-76 (citing 28 U.S.C. 292(a)). And in *Department of Transportation* v. *Association of American Railroads*, 135 S. Ct. 1225 (2015), Justice Alito's concurring opinion suggested that one of the members of the Board of Amtrak was not appointed in the manner required for a principal officer. *Id.* at 1239-1240.

[13] An individual's simultaneous service in more than one federal office is not uncommon. The Constitution prohibits Members of Congress from "holding any Office under the United States," U.S.

Petitioners appear to contend (Br. 51) that the problem with simultaneous service is that other judges on the CCAs might be "unduly influenced by" the status of Judges Burton, Celtnieks, Herring, and Mitchell as (assumed) principal officers on the CMCR. But as the CAAF explained, that argument erroneously "presumes that [a judge's] status as a principal officer on the []CMCR somehow carries over to the CCA, and invests him with authority or status not held by ordinary CCA judges." J.A. 141. "That is not the case." *Ibid.* "When [such a judge] sits as a CCA judge, he is no different from any other CCA judge." *Ibid.*

Nor is there any general principle that a multimember adjudicative body may not be composed of members who have differing status in other contexts. CCA panels can be composed of judges who hold different military ranks. The original Circuit Courts consisted of Justices of this Court sitting with district judges. Judiciary Act of 1789, ch. 20, § 4, 1 Stat. 74-75. Today, three-judge district courts include both district

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Const. Art. I, § 6, Cl. 2, but does not otherwise limit dual office-holding. Following the repeal of a statute barring individuals from holding multiple federal offices, OLC has "repeatedly concluded that 'there is no longer any prohibition against dual office-holding'" within the Executive Branch. *Designation of Acting Solicitor of Labor*, 26 Op. O.L.C. 211, 212 (2002) (citation omitted); see *ibid.* (citing seven prior opinions). Thus, for example, OLC concluded that the same individual could "serve simultaneously as the Director of the Office of Government Ethics and Chief Judge of the Court of Veterans Appeals." *Dual Office of Chief Judge of Court of Veterans Appeals and Dir. of the Office of Gov't Ethics*, 13 Op. O.L.C. 241, 241 (1989). And this Court has concluded that the Constitution "contains no prohibition against the service of active federal judges" on the Sentencing Commission, relying in part on a history of extrajudicial service dating to the Founding. *Mistretta* v. *United States*, 488 U.S. 361, 398 (1989); see *id.* at 398-401.

and circuit judges. 28 U.S.C. 2284(b)(1). And both district judges and retired Justices of this Court sit by designation on panels of the courts of appeals. 28 U.S.C. 292(a) and (d), 294(a).

B. Petitioners also briefly suggest (Br. 53-54) that it could raise questions under the Commander-in-Chief Clause if military officers could be appointed to the CMCR, where, in petitioners' view, they could be removed only for inefficiency, neglect of duty, or malfeasance. As previously explained, however, that argument rests on a mistaken premise: Judges Burton, Celtnieks, Herring, and Mitchell remained subject to the reassignment provisions in 10 U.S.C. 949b(b) even after their appointments. See pp. 29-30, *supra*. Petitioners do not contend that the restrictions on reassignment in Section 949b(b) impinge on the President's authority as Commander in Chief.

III. THIS COURT LACKS JURISDICTION IN *DALMAZZI* AND *COX*, BUT HAS JURISDICTION IN *ORTIZ*

A. This Court Lacks Jurisdiction In *Dalmazzi* And *Cox* Because Section 1259(3) Does Not Authorize Review Of The CAAF's Denial Of Discretionary Review

In granting certiorari, this Court directed the parties to brief the question whether it has jurisdiction in *Dalmazzi* and *Cox*. J.A. 1. The Court lacks jurisdiction in those cases because the CAAF ultimately denied the petitions for discretionary review.

1. The CAAF granted review in *Dalmazzi* and *Cox* to decide constitutional and statutory questions arising from a military officer's simultaneous service on a CCA and as a presidentially-appointed judge on the CMCR. J.A. 14-15, 27-28, 39-40, 44, 101-102, 106-107, 120-121. When it became clear that Judges Burton, Celtnieks, Herring, and Mitchell had not actually been appointed

to the CMCR until after the CCAs issued their decisions, the CAAF vacated its grants of review and denied the petitions because the cases were "moot as to [the simultaneous-service] issues" on which it had granted review. J.A. 10; see J.A. 26, 38, 43, 100, 105, 119.

Petitioners seek this Court's review of those orders under Section 1259(3), which confers jurisdiction in "[c]ases in which the [CAAF] granted a petition for review." But the CAAF "vacate[d]" its orders granting review and then "denied" the petitions. J.A. 10, 26, 38, 43, 100, 105, 119. As a result, *Dalmazzi* and *Cox* are no longer cases in which the CAAF "granted a petition for review" within the meaning of Section 1259(3). That understanding is confirmed by a related provision, which precludes this Court's review of "any action" by the CAAF "in refusing to grant a petition for review":

> Decisions of the United States Court of Appeals for the Armed Forces are subject to review by the Supreme Court by writ of certiorari as provided in [28 U.S.C. 1259]. The Supreme Court may not review by a writ of certiorari under this section *any action* of the [CAAF] in refusing to grant a petition for review.

10 U.S.C. 867a(a) (emphasis added). By its plain terms, Section 867a(a)'s preclusion of review applies here because the CAAF ultimately denied—*i.e.*, "refus[ed] to grant"—the petitions.

2. Although we highlighted Section 867a(a) at the certiorari stage (*Dalmazzi-Cox* Br. in Opp. 10-11), petitioners do not cite it—let alone attempt to reconcile their position with its plain text. The arguments petitioners do advance are unpersuasive.

First, petitioners argue (Br. 25) that these cases fall within Section 1259(3)'s literal terms because the CAAF

initially "granted a petition for review." But petitioners do not appear to deny that the CAAF had authority to reconsider its orders granting review. That authority flows from the principle that a court "ordinarily has the power to modify or rescind its orders at any point prior to final judgment." *Dietz* v. *Bouldin*, 136 S. Ct. 1885, 1892 (2016). And once the CAAF exercised that authority and vacated its orders granting review, these cases ceased to be "[c]ases in which the [CAAF] granted a petition for review."

Courts of appeals have reached the same conclusion under 28 U.S.C. 1292(b), which confers jurisdiction over an interlocutory appeal if the district court enters an order certifying that the statutory standard is met. When a district court initially enters the required order but then withdraws it before the court of appeals takes jurisdiction, the withdrawal "destroys [the court of appeals'] jurisdiction." *Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.* v. *Whitaker*, 841 F.3d 730, 732 (7th Cir. 2016); accord *City of L.A., Harbor Div.* v. *Santa Monica Baykeeper*, 254 F.3d 882, 889 (9th Cir. 2001). The same principle applies here.

Second, petitioners contend (Br. 25-26) that the context and legislative history of Section 1259(3) support their interpretation. In fact, the opposite is true. When DOD proposed what is now Section 1259, it explained that the statute would "preclud[e] direct Supreme Court review in cases where the [CAAF] declined to exercise its discretionary jurisdiction." 1982 Hearing 39 (William H. Taft, IV, Gen. Counsel, DOD). The Chief Judge of the CAAF thus recognized that, if the proposal were enacted, the CAAF "would hold the key allowing access to the Supreme Court." *Id.* at 136 (Chief Judge

Robinson O. Everett, CAAF). The Senate Report echoed the same point, noting that "the number of cases which reach the Supreme Court" would be "dependent on the frequency with which the [CAAF] grants an accused's petition for review." Senate Report 34.

Petitioners could not contend that this Court would have jurisdiction if the CAAF had noted the date of the judges' appointments *before* it granted the petitions and then issued exactly the same written decision denying review at the outset. Petitioners identify no sound reason why this Court's jurisdiction should turn on the fortuity of whether the CAAF notes such a defect before or after it grants a petition for review. To the contrary, just as this Court would have no ready criteria by which to review the CAAF's initial denials of discretionary review, it is equally unclear what standards it would apply to the CAAF's discretionary decision to deny review in a case in which it initially granted a petition.[14]

Third, petitioners contend (Br. 26) that the government's position here is inconsistent with its position in *United States* v. *Denedo*, 556 U.S. 904 (2009). That is not so. *Denedo* involved Section 1259(4), which gives this Court jurisdiction over cases "in which the [CAAF] granted relief." The government argued, and this

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[14] Petitioners speculate (Br. 25-26) that the CAAF could seek to insulate its decisions from this Court's review by purporting to deny review in cases in which it issued opinions resolving the merits. But petitioners do not and could not contend that there was any such evasion here. The CAAF denied the petitions in *Dalmazzi* and *Cox*, but it promptly resolved the relevant questions in *Ortiz*, the first case in which they were squarely presented. And petitioners err in impugning (Br. 26) the CAAF's practice in other cases of denying or dismissing petitions for review when, "after granting review, [it] concludes that it lacks jurisdiction." Like any court, the CAAF is powerless to act on the merits of a case if it lacks jurisdiction.

Court held, that a CAAF decision reversing a CCA's denial of a petition for a writ of *coram nobis* and remanding for further proceedings "granted relief" within the meaning of Section 1259(4). *Denedo*, 556 U.S. at 909. These cases involve a different provision with materially different language.

Finally, there is no merit to petitioners' assertion (Br. 27) that interpreting Section 1259(3) to preclude review here "would raise serious constitutional concerns." Until 1983, this Court had *no* jurisdiction to review the CAAF's decisions directly. See pp. 5-6, *supra*. Here, it is undisputed that this Court would lack jurisdiction if the CAAF had denied review at the outset. If there is no constitutional concern in those circumstances, there is likewise no constitutional problem in Congress's foreclosure of review here.

B. This Court Has Jurisdiction In *Ortiz* Because 28 U.S.C. 1259 Is A Valid Grant Of Appellate Jurisdiction

An amicus brief filed by Professor Bamzai argues (Br. 11-33) that Section 1259 is an unconstitutional expansion of the Court's original jurisdiction—which would mean that this Court lacks jurisdiction in *Ortiz* as well, and that it likewise lacked jurisdiction in each of the nine cases it has previously reviewed under Section 1259.[15] That is not correct. Section 1259 is a valid grant of appellate jurisdiction, and this Court therefore has jurisdiction in *Ortiz*.

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[15] *Denedo*, 556 U.S. 904; *Clinton* v. *Goldsmith*, 526 U.S. 529 (1999); *United States* v. *Scheffer*, 523 U.S. 303 (1998); *Edmond*, 520 U.S. 651; *Loving* v. *United States*, 517 U.S. 748 (1996); *Ryder* v. *United States*, 515 U.S. 177 (1995); *Davis* v. *United States*, 512 U.S. 452 (1994); *Weiss*, 510 U.S. 163; *Solorio* v. *United States*, 483 U.S. 435 (1987).

1. Article III grants this Court original jurisdiction "[i]n all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a party," and provides that "[i]n all other cases" the Court "shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." U.S. Const. Art. III, § 2, Cl. 2. It has been settled since *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803), that Congress may not expand the original jurisdiction conferred by Article III. In that case, the Court famously held that to issue a writ of mandamus requiring an Executive Branch officer to deliver a commission would be "to sustain an original action for that paper, and therefore seems not to belong to appellate, but to original jurisdiction." *Id.* at 175-176. The Court explained that "the essential criterion of appellate jurisdiction" is "that it revises and corrects the proceedings in a cause already instituted, and does not create that cause." *Id.* at 174.

2. Judged by that criterion, this Court's review of the CAAF's decisions under Section 1259 is appellate, not original. A writ of certiorari to the CAAF "revises and corrects the proceedings in a cause already instituted," *Marbury*, 5 U.S. at 174—specifically, a criminal proceeding in a specialized system of military courts that have been recognized since the Founding as competent to try and punish offenses by servicemembers.

The court-martial "is older than the Constitution." 1 David A. Schlueter, *Military Criminal Justice: Practice and Procedure* § 1-6(B), at 38-39 (9th ed. 2015). Indeed, the *Federalist Papers* discuss "trials by courts-martial" under the Articles of Confederation. *The Federalist No. 40*, at 250 (Madison) (Clinton Rossiter ed., 1961). The Constitution authorized Congress to carry

forward the court-martial system by empowering it to "make Rules for the Government and Regulation of the land and naval Forces." U.S. Const. Art. I, § 8, Cl. 14. And by exempting "cases arising in the land or naval forces," the Fifth Amendment's Grand Jury Clause contains a "recognition and sanction of an existing military jurisdiction," Winthrop 48 (emphasis omitted).

This Court has long recognized that those constitutional provisions "show that Congress has the power to provide for the trial and punishment of military and naval offenses in the manner then and now practiced by civilized nations," and that its power to do so is "entirely independent" of Article III. *Dynes* v. *Hoover*, 61 U.S. (20 How.) 65, 79 (1858). The Court has thus held that the judgments of a properly constituted court-martial, acting within its jurisdiction, "rest on the same basis, and are surrounded by the same considerations which give conclusiveness to the judgments of other legal tribunals." *Ex parte Reed*, 100 U.S. 13, 23 (1879). "The valid, final judgments of military courts, like those of any court of competent jurisdiction * * * , have res judicata effect." *Councilman*, 420 U.S. at 746. They are likewise given effect under the Double Jeopardy Clause. *Grafton* v. *United States*, 206 U.S. 333, 345 (1907).

The Constitution's broad grant of authority to Congress to "make rules for the government of the military" does not "freeze court-martial usage at a particular time." *Solorio* v. *United States*, 483 U.S. 435, 446 (1987). "Congress has gradually changed the system of military justice so that it has come to more closely resemble the civilian system." *Weiss*, 510 U.S. at 174. In so doing, it has established "an integrated system of military courts and review procedures." *Councilman*,

420 U.S. at 758. That system has broad jurisdiction over offenses committed by servicemembers, including offenses unconnected with military service. 10 U.S.C. 802(a), 805; see *Solorio*, 483 U.S. at 449-451. As a result, courts-martial exercise jurisdiction that overlaps with the criminal jurisdiction of federal and state courts. See *United States* v. *Kebodeaux*, 133 S. Ct. 2496, 2508-2509 & n.2 (2013) (Alito, J., concurring in the judgment). And the decisions of courts-martial are reviewed by the CCAs and by the CAAF, a court composed of civilian judges appointed for fixed terms and removable only for specified causes. 10 U.S.C. 942(b)(1) and (c).

3. Professor Bamzai argues that because the CAAF is an Article I tribunal located "within the Executive Branch," *Edmond*, 520 U.S. at 664 n.2, any review of the CAAF's decisions is original rather than appellate. But as Professor Bamzai acknowledges (Br. 23-26), this Court's appellate jurisdiction is not limited to reviewing the proceedings of Article III courts. The Court also exercises appellate jurisdiction over state courts, 28 U.S.C. 1257, and the non-Article III courts Congress has established for federal territories and the District of Columbia, 28 U.S.C. 1257(b), 1258, 1260.

This Court upheld the exercise of appellate jurisdiction over non-Article III territorial courts in *United States* v. *Coe*, 155 U.S. 76 (1894). The Court explained that Congress's plenary authority to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States," U.S. Const. Art. IV, § 3, Cl. 2, authorizes it to establish non-Article III "legislative courts" for the territories. *Coe*, 155 U.S. at 85; see *American Ins. Co.* v. *356 Bales of Cotton*, 26 U.S. (1 Pet.) 511, 546 (1828). And the Court concluded that "the judicial action of all inferior courts

established by Congress may, in accordance with the Constitution, be subjected to the appellate jurisdiction of the supreme judicial tribunal of the government." *Coe*, 155 U.S. at 86.

This Court has likewise held that Congress's power "[t]o exercise exclusive legislation in all cases whatsoever" over the District of Columbia, U.S. Const. Art. I, § 8, Cl. 17, authorizes it to establish non-Article III courts for the District. *Palmore* v. *United States*, 411 U.S. 387, 410 (1973). The Court explained that "the requirements of Article III * * * must in proper circumstances give way to accommodate plenary grants of power to Congress to legislate with respect to specialized areas having particularized needs and warranting distinctive treatment." *Id.* at 408.

The system of courts-martial Congress has established under Article I, § 8, Cl. 14, stands on similar footing. "It too involves a constitutional grant of power that has been historically understood as giving the political Branches of Government extraordinary control over the precise subject matter at issue." *Northern Pipeline Constr. Co.* v. *Marathon Pipeline Co.*, 458 U.S. 50, 66 (1982) (plurality opinion); see *ibid.* ("The situation [with respect to courts-martial] strongly resembles the situation with respect to territorial courts."). Indeed, the Court in *Palmore* identified the court-martial system as one of the "specialized areas having particularized needs" where Congress has permissibly created non-Article III courts. 411 U.S. at 408; see *id.* at 404 (describing courts-martial as "another context in which criminal cases arising under federal statutes are tried, and defendants convicted, in non-Art. III courts").

Accordingly, just as the decisions of the territorial courts "may, in accordance with the Constitution, be

subjected to the appellate jurisdiction" of this Court, *Coe*, 155 U.S. at 86, Congress may grant this Court appellate jurisdiction to review the CAAF's decisions. And because courts-martial, like territorial courts, "are unique historical exceptions" to Article III grounded in "other provisions of the Constitution," *Wellness Int'l Network, Ltd.* v. *Sharif*, 135 S. Ct. 1932, 1964 (2015) (Thomas, J., dissenting), this Court can uphold Section 1259 without deciding whether Congress could confer jurisdiction on the Court to review directly the decisions of other non-Article III tribunals, such as those that adjudicate matters of "public rights," *ibid.* See Caleb Nelson, *Adjudication in the Political Branches*, 107 Colum. L. Rev. 559, 576 (2007) ("Like territorial courts, of course, [courts-martial] act upon core private rights to person and property.").

4. Professor Bamzai observes (Br. 14-17) that in a line of cases beginning with *Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243 (1864), this Court has held or stated that it lacks jurisdiction to review the decisions of military commissions. But those cases, including *Vallandigham*, noted the absence of *statutory* jurisdiction. See *Vallandigham*, 68 U.S. at 251. Accordingly, just a few years before Congress enacted Section 1259, this Court cited *Vallandigham* and several of the other decisions on which Professor Bamzai relies as standing for the proposition that Congress has "never deemed it appropriate to confer on this Court 'appellate jurisdiction to supervise the administration of criminal justice in the military'"—not the far more sweeping proposition that Congress *could not* confer such jurisdiction. *Councilman*, 420 U.S. at 746 (citation omitted).

To be sure, the Court's opinion in *Vallandigham* also indicated that review in that case would have been inconsistent with Article III. See 68 U.S. at 252-253. But the military commission at issue there was not a court established by Congress; it was, instead, created on the authority of a commanding general, who conducted the only review of its findings and sentence. *Id.* at 243-244, 247-248. As a result, the writ of certiorari sought was to be directed to the Army Judge Advocate General, not to any tribunal. *Id.* at 243. And in concluding that the military commission was not of a "judicial character," the Court relied in part on *United States* v. *Ferreira*, 54 U.S. (13 How.) 40 (1852), which held that a district judge was not acting in a judicial capacity when he rendered decisions subject to review by the Secretary of the Treasury. *Id.* at 47-48; see *Vallandigham*, 68 U.S. at 253. The CAAF, in contrast, is a court established by Act of Congress in the system of military justice recognized by the Constitution, and its decisions are of the same judicial character as those of the territorial courts and the District of Columbia Court of Appeals.[16]

IV. EVEN IF THIS COURT HAS JURISDICTION IN *DALMAZZI* AND *COX*, IT SHOULD NOT DISTURB THE CAAF'S DISCRETIONARY DENIALS OF REVIEW

Even if this Court concludes that it has jurisdiction in *Dalmazzi* and *Cox*, it should not disturb the CAAF's denial of review in those cases. As petitioners do not dispute, the CAAF had discretion to grant or deny the

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[16] The judges of the CAAF are removable by the President for specified causes. 10 U.S.C. 942(c). But judges on territorial courts have likewise been removable by the President. See *Shurtleff* v. *United States*, 189 U.S. 311, 316 (1903); *Kuretski* v. *Commissioner*, 755 F.3d 929, 941 (D.C. Cir. 2014), cert. denied, 135 S. Ct. 2309 (2015).

petitions for review. 10 U.S.C. 867(a)(3). At most, therefore, this Court could review the CAAF's action for "abuse of discretion." *Highmark Inc.* v. *Allcare Health Mgmt. Sys., Inc.*, 134 S. Ct. 1744 (2014) (citation omitted). The CAAF did not abuse its discretion in denying review in *Dalmazzi* and *Cox* after it discovered that the questions it had agreed to decide were not presented. This Court, too, has dismissed writs of certiorari as improvidently granted when it becomes apparent that the question on which it granted review is not cleanly presented. See *Supreme Court Practice* § 5.15, at 360-361.

Petitioners contend (Br. 27-28) that the CAAF erred in describing its denial of review in *Dalmazzi* as a matter of "mootness." But as the context makes clear—and as petitioners acknowledge (Br. 28)—the CAAF's statement that the case was "moot as to th[e] issues" on which it had granted review was not meant to convey that the case was moot in the Article III sense. J.A. 10. Instead, it reflected the CAAF's conclusion that the case did not actually present the relevant issues. The CAAF's use of colloquial language in expressing that conclusion furnishes no basis for review.

Petitioners also contend (Br. 28-29) that the petitioners in *Dalmazzi* and *Cox* have valid claims under Section 973(b) even though Judges Burton, Celtnieks, Herring, and Mitchell were not appointed to the CMCR until after they acted on the appeals in those cases. Petitioners observe (Br. 29) that Section 973(b) provides that an officer may not "hold, or exercise the functions of," a prohibited civil office, 10 U.S.C. 973(b)(2)(A), and they argue that the judges "exercise[d] the functions" of a CMCR judge even before their appointments.

Even if that argument were correct, it would not establish an abuse of discretion.[17] The CAAF was presented with the same argument. See *Dalmazzi* CAAF Supp. Br. 8. But it did not address that argument, and did not otherwise resolve the merits of the statutory and constitutional challenges in *Dalmazzi* and *Cox*. Instead, it denied discretionary review—perhaps because it concluded that the applicability of Section 973(b) during the four weeks between the judges' confirmation and their appointments lacked sufficient continuing importance to warrant an exercise of its discretionary jurisdiction. In taking that step, the CAAF acted well within its discretion.

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[17] Petitioners' argument is not, in fact, correct. It is true enough that Judges Burton, Celtnieks, Herring, and Mitchell exercised the functions of a CMCR judge before their appointments. But that is because they had previously been assigned to the CMCR by the Secretary of Defense. Petitioners acknowledge (Br. 41) that the functions of assigned and appointed judges are "'substantively identical' in terms of their duties." Br. 41 (citation omitted). Thus, even if petitioners' reading of Section 973(b) were otherwise correct, the statute would not have been implicated until the President actually appointed the judges to the CMCR. Until then, the judges were "exercis[ing] the functions" of their previously assigned positions.

CONCLUSION

In *Dalmazzi* and *Cox*, the writs of certiorari should be dismissed for lack of jurisdiction. In *Ortiz*, the judgment of the CAAF should be affirmed.

Respectfully submitted.

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DECEMBER 2017

APPENDIX A

1. U.S. Const. Art. I, § 8 provides in pertinent part:

The Congress shall have Power * * *

[14] To make Rules for the Government and Regulation of the land and naval Forces;

* * * * *

2. U.S. Const. Art. II, § 2, Cls. 1-2 provide:

[1] The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Office in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

[2] He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

3. U.S. Const. Art. III, § 2, Cls. 1-2 provide:

[1] The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

[2] In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

4. 10 U.S.C. 866 provides:

Art. 66. Review by Court of Criminal Appeals

(a) Each Judge Advocate General shall establish a Court of Criminal Appeals which shall be composed of one or more panels, and each such panel shall be composed of not less than three appellate military

judges. For the purpose of reviewing court-martial cases, the court may sit in panels or as a whole in accordance with rules prescribed under subsection (f). Any decision of a panel may be reconsidered by the court sitting as a whole in accordance with such rules. Appellate military judges who are assigned to a Court of Criminal Appeals may be commissioned officers or civilians, each of whom must be a member of a bar of a Federal court or of the highest court of a State. The Judge Advocate General shall designate as chief judge one of the appellate military judges of the Court of Criminal Appeals established by him. The chief judge shall determine on which panels of the court the appellate judges assigned to the court will serve and which military judge assigned to the court will act as the senior judge on each panel.

(b) The Judge Advocate General shall refer to a Court of Criminal Appeals the record in each case of trial by court-martial—

(1) in which the sentence, as approved, extends to death, dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement for one year or more; and

(2) except in the case of a sentence extending to death, the right to appellate review has not been waived or an appeal has not been withdrawn under section 861 of this title (article 61).

(c) In a case referred to it, the Court of Criminal Appeals may act only with respect to the findings and sentence as approved by the convening authority. It may affirm only such findings of guilty, and the sen-

tence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

(d) If the Court of Criminal Appeals sets aside the findings and sentence, it may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If it sets aside the findings and sentence and does not order a rehearing, it shall order that the charges be dismissed.

(e) The Judge Advocate General shall, unless there is to be further action by the President, the Secretary concerned, the Court of Appeals for the Armed Forces, or the Supreme Court, instruct the convening authority to take action in accordance with the decision of the Court of Criminal Appeals. If the Court of Criminal Appeals has ordered a rehearing but the convening authority finds a rehearing impracticable, he may dismiss the charges.

(f) The Judge Advocates General shall prescribe uniform rules of procedure for Courts of Criminal Appeals and shall meet periodically to formulate policies and procedure in regard to review of court-martial cases in the offices of the Judge Advocates General and by Courts of Criminal Appeals.

(g) No member of a Court of Criminal Appeals shall be required, or on his own initiative be permitted,

to prepare, approve, disapprove, review, or submit, with respect to any other member of the same or another Court of Criminal Appeals, an effectiveness, fitness, or efficiency report, or any other report or document used in whole or in part for the purpose of determining whether a member of the armed forces is qualified to be advanced in grade, or in determining the assignment or transfer of a member of the armed forces, or in determining whether a member of the armed forces should be retained on active duty.

(h) No member of a Court of Criminal Appeals shall be eligible to review the record of any trial if such member served as investigating officer in the case or served as a member of the court-martial before which such trial was conducted, or served as military judge, trial or defense counsel, or reviewing officer of such trial.

5. 10 U.S.C. 867 provides:

Art. 67. Review by the Court of Appeals for the Armed Forces

(a) The Court of Appeals for the Armed Forces shall review the record in—

(1) all cases in which the sentence, as affirmed by a Court of Criminal Appeals, extends to death;

(2) all cases reviewed by a Court of Criminal Appeals which the Judge Advocate General orders sent to the Court of Appeals for the Armed Forces for review; and

(3) all cases reviewed by a Court of Criminal Appeals in which, upon petition of the accused and on good cause shown, the Court of Appeals for the Armed Forces has granted a review.

(b) The accused may petition the Court of Appeals for the Armed Forces for review of a decision of a Court of Criminal Appeals within 60 days from the earlier of—

(1) the date on which the accused is notified of the decision of the Court of Criminal Appeals; or

(2) the date on which a copy of the decision of the Court of Criminal Appeals, after being served on appellate counsel of record for the accused (if any), is deposited in the United States mails for delivery by first-class certified mail to the accused at an address provided by the accused or, if no such address has been provided by the accused, at the latest address listed for the accused in his official service record.

The Court of Appeals for the Armed Forces shall act upon such a petition promptly in accordance with the rules of the court.

(c) In any case reviewed by it, the Court of Appeals for the Armed Forces may act only with respect to the findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law by the Court of Criminal Appeals. In a case which the Judge Advocate General orders sent to the Court of Appeals for the Armed Forces, that action need be taken only with respect to the issues raised by him. In a case reviewed upon petition of the accused,

that action need be taken only with respect to issues specified in the grant of review. The Court of Appeals for the Armed Forces shall take action only with respect to matters of law.

(d) If the Court of Appeals for the Armed Forces sets aside the findings and sentence, it may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If it sets aside the findings and sentence and does not order a rehearing, it shall order that the charges be dismissed.

(e) After it has acted on a case, the Court of Appeals for the Armed Forces may direct the Judge Advocate General to return the record to the Court of Criminal Appeals for further review in accordance with the decision of the court. Otherwise, unless there is to be further action by the President or the Secretary concerned, the Judge Advocate General shall instruct the convening authority to take action in accordance with that decision. If the court has ordered a rehearing, but the convening authority finds a rehearing impracticable, he may dismiss the charges.

6. 10 U.S.C. 867a provides:

Art. 67a. Review by the Supreme Court

(a) Decisions of the United States Court of Appeals for the Armed Forces are subject to review by the Supreme Court by writ of certiorari as provided in section 1259 of title 28. The Supreme Court may not review by a writ of certiorari under this section any

action of the Court of Appeals for the Armed Forces in refusing to grant a petition for review.

(b) The accused may petition the Supreme Court for a writ of certiorari without prepayment of fees and costs or security therefor and without filing the affidavit required by section 1915(a) of title 28.

7. 10 U.S.C. 949b(b) provides:

Unlawfully influencing action of military commission and United States Court of Military Commission Review

(b) UNITED STATES COURT OF MILITARY COMMISSION REVIEW.—(1) No person may attempt to coerce or, by any unauthorized means, influence—

(A) the action of a judge on the United States Court of Military Commissions Review in reaching a decision on the findings or sentence on appeal in any case; or

(B) the exercise of professional judgment by trial counsel or defense counsel appearing before the United States Court of Military Commission Review.

(2) No person may censure, reprimand, or admonish a judge on the United States Court of Military Commission Review, or counsel thereof, with respect to any exercise of their functions in the conduct of proceedings under this chapter.

(3) The provisions of this subsection shall not apply with respect to—

(A) general instructional or informational courses in military justice if such courses are designed solely for the purpose of instructing members of a command in the substantive and procedural aspects of military commissions; or

(B) statements and instructions given in open proceedings by a judge on the United States Court of Military Commission Review, or counsel.

(4) No appellate military judge on the United States Court of Military Commission Review may be reassigned to other duties, except under circumstances as follows:

(A) The appellate military judge voluntarily requests to be reassigned to other duties and the Secretary of Defense, or the designee of the Secretary, in consultation with the Judge Advocate General of the armed force of which the appellate military judge is a member, approves such reassignment.

(B) The appellate military judge retires or otherwise separates from the armed forces.

(C) The appellate military judge is reassigned to other duties by the Secretary of Defense, or the designee of the Secretary, in consultation with the Judge Advocate General of the armed force of which the appellate military judge is a member, based on military necessity and such reassignment is consistent with service rotation regulations (to the extent such regulations are applicable).

(D) The appellate military judge is withdrawn by the Secretary of Defense, or the designee of the Secretary, in consultation with the Judge Advocate General of the armed force of which the appellate military judge is a member, for good cause consistent with applicable procedures under chapter 47 of this title (the Uniform Code of Military Justice).

8. 10 U.S.C. 950f provides:

Review by United States Court of Military Commission Review

(a) ESTABLISHMENT.—There is a court of record to be known as the "United States Court of Military Commission Review" (in this section referred to as the "Court"). The Court shall consist of one or more panels, each composed of not less than three judges on the Court. For the purpose of reviewing decisions of military commissions under this chapter, the Court may sit in panels or as a whole, in accordance with rules prescribed by the Secretary of Defense.

(b) JUDGES.—(1) Judges on the Court shall be assigned or appointed in a manner consistent with the provisions of this subsection.

(2) The Secretary of Defense may assign persons who are appellate military judges to be judges on the Court. Any judge so assigned shall be a commissioned officer of the armed forces, and shall meet the qualifications for military judges prescribed by section 948j(b) of this title.

(3) The President may appoint, by and with the advice and consent of the Senate, additional judges to the United States Court of Military Commission Review.

(4) No person may serve as a judge on the Court in any case in which that person acted as a military judge, counsel, or reviewing official.

(c) CASES TO BE REVIEWED.—The Court shall, in accordance with procedures prescribed under regulations of the Secretary, review the record in each case that is referred to the Court by the convening authority under section 950c of this title with respect to any matter properly raised by the accused.

(d) STANDARD AND SCOPE OF REVIEW.—In a case reviewed by the Court under this section, the Court may act only with respect to the findings and sentence as approved by the convening authority. The Court may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, the Court may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the military commission saw and heard the witnesses.

(e) REHEARINGS.—If the Court sets aside the findings or sentence, the Court may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If the Court sets aside the findings or sentence and does not order a rehearing, the Court shall order that the charges be dismissed.

9. 10 U.S.C. 973 provides in pertinent part:

Duties: officers on active duty; performance of civil functions restricted

* * * * *

(b)(1) This subsection applies—

(A) to a regular officer of an armed force on the active-duty list (and a regular officer of the Coast Guard on the active duty promotion list);

(B) to a retired regular officer of an armed force serving on active duty under a call or order to active duty for a period in excess of 270 days; and

(C) to a reserve officer of an armed force serving on active duty under a call or order to active duty for a period in excess of 270 days.

(2)(A) Except as otherwise authorized by law, an officer to whom this subsection applies may not hold, or exercise the functions of, a civil office in the Government of the United States—

(i) that is an elective office;

(ii) that requires an appointment by the President by and with the advice and consent of the Senate; or

(iii) that is a position in the Executive Schedule under sections 5312 through 5317 of title 5.

(B) An officer to whom this subsection applies may hold or exercise the functions of a civil office in the Government of the United States that is not described

in subparagraph (A) when assigned or detailed to that office or to perform those functions.

(3) Except as otherwise authorized by law, an officer to whom this subsection applies by reason of subparagraph (A) of paragraph (1) may not hold or exercise, by election or appointment, the functions of a civil office in the government of a State (or of any political subdivision of a State).

* * * * *

(5) Nothing in this subsection shall be construed to invalidate any action undertaken by an officer in furtherance of assigned official duties.

* * * * *

(d) The Secretary of Defense, and the Secretary of Homeland Security with respect to the Coast Guard when it is not operating in the Navy, shall prescribe regulations to implement this section.

10. 28 U.S.C. 1259 provides:

Court of Appeals for the Armed Forces; certiorari

Decisions of the United States Court of Appeals for the Armed Forces may be reviewed by the Supreme Court by writ of certiorari in the following cases:

(1) Cases reviewed by the Court of Appeals for the Armed Forces under section 867(a)(1) of title 10.

(2) Cases certified to the Court of Appeals for the Armed Forces by the Judge Advocate General under section 867(a)(2) of title 10.

(3) Cases in which the Court of Appeals for the Armed Forces granted a petition for review under section 867(a)(3) of title 10.

(4) Cases, other than those described in paragraphs (1), (2), and (3) of this subsection, in which the Court of Appeals for the Armed Forces granted relief.

11. 10 U.S.C. 973 (1982) provided in pertinent part:

Duties: officers on active duty; performance of civil functions restricted

(a) No officer of an armed force on active duty may accept employment if that employment requires him to be separated from his organization, branch, or unit, or interferes with the performance of his military duties.

(b) Except as otherwise provided by law, no regular officer of an armed force on active duty may hold a civil office by election or appointment, whether under the United States, a Territory or possession, or a State. The acceptance of such a civil office or the exercise of its functions by such an officer terminates his military appointment.

12. Department of Defense Authorization Act, 1984, Pub. L. No. 98-94, Tit. X, Pt. A, § 1002, 97 Stat. 655-656 provides:

PERFORMANCE OF CIVIL FUNCTIONS BY MILITARY OFFICERS

SEC. 1002. (a) Section 973 of title 10, United States Code, is amended by striking out subsection (b) and inserting in lieu thereof the following:

"(b)(1) This subsection applies—

"(A) to a regular officer of an armed force on the active-duty list (and a regular officer of the Coast Guard on the active duty promotion list);

"(B) to a retired regular officer of an armed force serving on active duty under a call or order to active duty for a period in excess of 180 days; and

"(C) to a reserve officer of an armed force serving on active duty under a call or order to active duty for a period in excess of 180 days.

"(2)(A) Except as otherwise authorized by law, an officer to whom this subsection applies may not hold, or exercise the functions of, a civil office in the Government of the United States—

"(i) that is an elective office;

"(ii) that requires an appointment by the President by and with the advice and consent of the Senate; or

"(iii) that is a position in the Executive Schedule under sections 5312 through 5317 of title 5.

"(B) An officer to whom this subsection applies may hold or exercise the functions of a civil office in the Government of the United States that is not described in subparagraph (A) when assigned or detailed to that office or to perform those functions.

"(3) Except as otherwise authorized by law, an officer to whom this subsection applies may not hold or exercise, by election or appointment, the functions of a civil office in the government of a State, the District of Columbia, or a territory, possession, or commonwealth of the United States (or of any political subdivision of any such government).

"(4) Nothing in this subsection shall be construed to invalidate any action undertaken by an officer in furtherance of assigned official duties.

"(c) The Secretary of Defense, and the Secretary of Transportation with respect to the Coast Guard when it is not operating in the Navy, shall prescribe regulations to implement this section.".

(b) Nothing in section 973(b) of title 10, United States Code, as in effect before the date of the enactment of this Act, shall be construed—

(1) to invalidate any action undertaken by an officer of an Armed Force in furtherance of assigned official duties; or

(2) to have terminated the military appointment of an officer of an Armed Force by reason of the acceptance of a civil office, or the exercise of its functions, by that officer in furtherance of assigned official duties.

(c) Nothing in section 973(b)(3) of title 10, United States Code, as added by subsection (a), shall preclude a Reserve officer to whom such section applies from holding or exercising the functions of an office described in such section for the term to which the Reserve officer was elected or appointed if, before the date of the enactment of this Act, the Reserve officer accepted appointment or election to that office in accordance with the laws and regulations in effect at the time of such appointment or election.

(d) The Act entitled "An Act to grant the consent of the United States to the Red River Compact among the States of Arkansas, Louisiana, Oklahoma, and Texas", approved December 22, 1980 (94 Stat. 3305), is amended by adding at the end thereof the following new section:

"SEC. 5. (a) The President may appoint a regular officer of the Army, Navy, Air Force, or Marine Corps who is serving on active duty as the Federal Commissioner of the Commission.

"(b) Notwithstanding the provisions of section 973(b) of title 10, United States Code, acceptance by a regular officer of the Army, Navy, Air Force, or Marine Corps of an appointment as the Federal Commissioner of the Commission, or the exercise of the functions of Federal Commissioner and chairman of the Commission, by such officer shall not terminate or otherwise affect such officer's appointment as a military officer.".

13. Act of July 15, 1870, ch. 294, § 18, 16 Stat. 819 provides:

SEC. 18. *And be it further enacted*, That it shall not be lawful for any officer of the army of the United States on the active list to hold any civil office, whether by election or appointment, and any such officer accepting or exercising the functions of a civil office shall at once cease to be an officer of the army, and his commission shall be vacated thereby.

APPENDIX B

Department of Defense

DIRECTIVE

NUMBER 1344.10
Feb. 19, 2008

USD(P&R)

SUBJECT: Political Activities by Members of the Armed Forces

References: (a) DoD Directive 1344.10, "Political Activities by Members of the Armed Forces on Active Duty," August 2, 2004 (hereby canceled)

(b) Sections 973, 888, 101, and Chapter 47 of title 10, United States Code

(c) DoD Instruction 1334.1, "Wearing of the Uniform," October 26, 2005

(d) Section 441a of title 2, United States Code

(e) through (i), see Enclosure 1

1. PURPOSE

This Directive:

1.1. Reissues Reference (a) to update policies on political activities of members of the Armed Forces.

1.2. Implements section 973(b) through (d) of Reference (b).

* * * * *

3. DEFINITIONS

The terms used in this Directive are defined in Enclosure 2.

4. POLICY

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4.4. Holding and Exercising the Functions of a U.S. Government Civil Office Attained by Election or Appointment

4.4.1. Paragraph 4.4. applies to a civil office in the U.S. Government that:

4.4.1.1. Is an elective office;

4.4.1.2. Requires an appointment by the President; or

4.4.1.3. Is in a position on the executive schedule under sections 5312-5317 of Reference (i).

4.4.2. A regular member, or retired regular or Reserve Component member on active duty under a call or order to active duty for more than 270 days, may not hold or exercise the functions of civil office set out in subparagraph 4.4.1. unless otherwise authorized in paragraph 4.4. or by law.

4.4.3. A retired regular member, or a Reserve Component member on active duty under a call or order to active duty for 270 days or fewer, may hold and

exercise the functions of a civil office provided there is no interference with the performance of military duty.

4.4.4. A member on active duty may hold and exercise the functions of a civil office under paragraph 4.4. when assigned or detailed (while on active duty) to such office to perform such functions, provided the assignment or detail does not interfere with military duties.

4.4.5. Any member on active duty authorized to hold or exercise or not prohibited from holding or exercising the functions of office under paragraph 4.4. are still subject to the prohibitions of subparagraph 4.1.2.

* * * * *

4.6. Actions When Prohibitions Apply

4.6.1. Members affected by the prohibitions against being a nominee or candidate or holding or exercising the functions of a civil office may request retirement (if eligible), discharge, or release from active duty. The Secretary concerned may approve these requests, consistent with the needs of the Service, unless the member is:

4.6.1.1. Obligated to fulfill an active duty service commitment.

4.6.1.2. Serving or has been issued orders to serve afloat or in an area that is overseas, remote, a combat zone, or a hostile pay fire area.

4.6.1.3. Ordered to remain on active duty while the subject of an investigation or inquiry.

4.6.1.4. Accused of an offense under Chapter 47 of Reference (b) or serving a sentence or punishment for such an offense.

4.6.1.5. Pending other administrative separation action or proceedings.

4.6.1.6. Indebted to the United States.

4.6.1.7. In a Reserve Component and serving involuntarily under a call or order to active duty that specifies a period of active duty of more that 270 days during a period of declared war or national emergency; or other period when a unit or individual of the National Guard or other Reserve Component has been involuntarily called or ordered to active duty as authorized by law.

4.6.1.8. In violation of this Directive or an order or regulation prohibiting such member from assuming or exercising the functions of civil office.

4.6.2. Subparagraph 4.6.1. does not preclude a member's involuntary discharge or release from active duty.

4.6.3. No actions undertaken by a member in carrying out assigned military duties shall be invalidated solely by virtue of such member having been a candidate or nominee for a civil office in violation of the prohibition of paragraph 4.2. or having held or exercised the functions of a civil office in violation of the prohibitions of paragraphs 4.4. or 4.5.

4.6.4. This is a lawful general regulation. Violations of paragraphs 4.1. through 4.5. of this Directive by persons subject to the Uniform Code of Military

Justice are punishable under Article 92, "Failure to Obey Order or Regulation," Chapter 47 of Reference (b).

* * * * *

E2. ENCLOSURE 2

DEFINITIONS

* * * * *

E2.3. Civil Office. A non-military office involving the exercise of the powers or authority of civil government, to include elective and appointed office in the U.S. Government, a U.S. territory or possession, State, county, municipality, or official subdivision thereof. This term does not include a non-elective position as a regular or reserve member of civilian law enforcement, fire, or rescue squad.

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